Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Public Interest Obligations	)	MM Docket No. 99-360
Of TV Broadcast Licensees	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

The National Association of Broadcasters ("NAB") submits these comments in response to the Commission's *Notice of Inquiry* ("*Notice*") seeking comment on the public interest obligations of television broadcasters as they transition to digital transmission technology. The *Notice* requested comment on four broad categories of issues: (1) the application of television stations' public interest obligations to the new capabilities of digital television ("DTV"), such as multiple channel transmission; (2) how television stations could serve their communities by providing viewers with information on their public interest activities, and using digital technology to provide emergency information in new ways; (3) how DTV broadcasters could increase access to television programming by people with disabilities, and further diversity; and (4) whether digital broadcasters could enhance the quality of political discourse through uses of the airwaves for political issues and debates.

Broadcasters are proud of their record of public service. Local stations are the primary source of news, election information, disaster warnings and other emergency information, and information about community affairs for the overwhelming majority of Americans. The President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters did not identify any area in which the public believed that broadcasters provided inadequate public service. NAB's 1998 study, cited by the Commission, revealed that broadcasters provided $6.85 billion in public service activities in 1996. Thus, there is no predicate for determining that new public service requirements are needed.

In addressing the various issues raised in the *Notice*, NAB first identifies a number of general themes that should inform the Commission's approach as it seeks to define the public interest obligations of television broadcasters in a digital environment:

■ The Commission should refrain from prematurely establishing public interest obligations for digital services that have yet to be developed.

■ The mere use of digital, as opposed to analog, transmission technology does not warrant the adoption of new and expanded public interest obligations. In particular, the transition to DTV does not justify the imposition of expanded public interest duties that are not reasonably germane to digital broadcasting or technology.

■ As recognized by Congress in the Telecommunications Act of 1996 ("1996 Act"), convergence in telecommunications technology should be accompanied by convergence in regulatory treatment. Thus, the Commission should not impose unequal burdens on different types of licensees, if they are competing in the same markets by offering the same services.

■ The extraction of additional public interest concessions from DTV broadcasters on the basis of a *quid pro quo* is unjustified. There is no basis for imposing new and expansive public interest obligations as a form of payment for the mere temporary loan of additional spectrum during the digital conversion, especially in light of Congress' intent in the 1996 Act to preserve free television and promote the competitiveness of over-the-air broadcast stations.

■ In light of the significant public interest obligations already imposed on broadcasters, additional public interest duties can be justified only if the evidence demonstrates that the existing standards are inadequate, and that the benefits of any new obligations outweigh their costs.

■ In an era of tremendous growth in the number and variety of media outlets, the Commission should avoid inflexible regulation and rely primarily on marketplace forces when considering any new public interest obligations for DTV broadcasters.

■ The "scarcity doctrine" that has traditionally been used to justify affording lesser constitutional protection to the broadcast media is now regarded by many jurists and legal scholars as logically and factually deficient. The Commission must therefore be cautious in imposing new public interest obligations on broadcasters that implicate the First Amendment, as the Commission may be unable to rely on the traditional basis for establishing the constitutionality of any such obligations.

With these general precepts in mind, NAB argues that a number of the specific proposals in the *Notice* are premature, unrelated to digital broadcasting, unduly burdensome, lacking in evidentiary support or constitutionally suspect.

In considering how public interest programming duties should apply to a multicasting broadcaster, NAB asserts that it would be inappropriate to impose the full panoply of public interest obligations on all of the program streams that a multicasting broadcaster might offer

(particularly if such program streams are highly specialized, rather than general interest). But NAB points out that DTV broadcasters may ultimately choose not to multicast at all, but instead decide to broadcast primarily one high definition television signal, in which case broadcasters' existing programming-related public interest duties should not be altered. Given the entirely speculative nature of any multicasting services at this time, NAB advises the Commission to refrain from adopting special public interest obligations on multicasting, until such services actually develop.

In addition to multicasting, DTV broadcasters may also provide ancillary or supplementary services (such as Internet access or datacasting) that are not free over-the-air services. Because Congress generally intended to end the differentiated legal treatment of converging technologies in the 1996 Act, NAB believes that any ancillary or supplementary services offered by DTV broadcasters should be subject to the same public interest obligations as comparable services offered by non-broadcasters. Thus, if a DTV broadcaster were to offer an Internet access service, the public interest obligations applicable to that service should be comparable to those applied to any other licensee's Internet access service, even if a non-broadcaster. The terms of Section 336 of the Communications Act clearly support this position.

With regard to proposals for requiring additional disclosures in DTV stations' public files or requiring the posting of public files on the Internet, NAB sees no logical connection between broadcasters' disclosure obligations and their transmission of a digital, rather than an analog, signal. The *Notice* also cited no evidence tending to show that the existing disclosure obligations of television broadcasters are in any way inadequate or ineffective. The suggestion in the *Notice* to require DTV broadcasters to ascertain their community needs by certain specified means

should not be considered for the same reasons that the Commission previously eliminated similar ascertainment requirements in the 1980's.

Other proposals set forth in the *Notice* (including access to broadcast programming for persons with disabilities, the promotion of diversity in broadcasting, and the provision of enhanced disaster warnings) are either unrelated to digital technology or more appropriately addressed in other Commission proceedings. NAB further emphasizes that implementation of suggestions in the *Notice* concerning disability access and enhanced emergency warnings will depend on the manufacture of DTV receivers that can receive and decode the additional information that broadcasters might send in their DTV signals.

In addressing suggestions that the Commission should establish detailed public interest standards with numerical quotas, NAB contends that such proposals reflect an outdated model of regulation that is particularly inappropriate for the digital age. Given the competitive nature of the video programming marketplace and the available evidence regarding broadcaster performance, inflexible numerical public interest requirements are clearly unnecessary. Public interest standards with numerical quotas also improperly encroach on the editorial discretion of licensees.

The *Notice* additionally discussed ways the Commission could promote voluntary efforts by television broadcasters to enhance the political debate, and offered proposals to encourage or require broadcast licensees to provide free air time to candidates. NAB contends that, whether voluntary or mandatory, free air time proposals have no connection to digital broadcasting, are unlikely to be effective in improving the quality of political discourse, and are not needed to ensure the broadcast of fully sufficient amounts of political and campaign-related information. In light of the detailed *statutory* provisions establishing a system of political broadcasting based

on the purchase by candidates of air time at discounted rates, the Commission lacks the authority to adopt inconsistent rules requiring the provision of free time by DTV broadcasters. Given the logical and empirical deficiencies of the scarcity doctrine, a requirement for broadcast licensees to provide free air time to candidates would also be contrary to the First Amendment. Indeed, even under case law affording broadcasters a lesser degree of constitutional protection due to the presumed scarcity of spectrum, NAB believes that a free time mandate would be found unconstitutional, as treading unnecessarily on the editorial discretion of broadcast licensees.

In sum, nothing inherent in digital technology requires a different or more expansive public interest analysis than that currently applied to analog television broadcasters. NAB accordingly believes that DTV broadcasters should be afforded the discretion to develop and offer innovative programming and other services they believe will best meet the needs of the communities they serve.

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TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Inquiry* in this proceeding.[2] The *Notice* sought comment on the public interest obligations of television broadcasters as they transition to digital transmission technology. In adopting the *Notice*, the Commission emphasized that it was not proposing new rules or policies, but rather creating a forum for public debate on how broadcasters can best serve the public interest during and after the digital transition. Specifically, the Commission asked for comment on four broad categories of issues:

(1) the application of television stations' public interest obligations to the new capabilities of digital television ("DTV"), such as multiple channel transmission;

(2) how television stations could serve their communities by providing viewers with information on their public interest activities, and using digital technology to provide emergency information in new ways;

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[1] NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

[2] *Notice of Inquiry* in MM Docket No. 99-360, FCC 99-390 (rel. Dec. 20, 1999) ("*Notice*").

(3) how DTV broadcasters could increase access to television programming by people with disabilities, and further diversity; and

(4) whether digital broadcasters could enhance the quality of political discourse through uses of the airwaves for political issues and debate.

In addressing these various issues, NAB first identifies a number of general themes that should inform the Commission's approach as it seeks to define the public interest obligations of television broadcasters in a digital environment. With these general precepts in mind, NAB then addresses the specific categories of issues raised by the Commission.

I. THE COMMISSION'S CONSIDERATION OF THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS IN THE DIGITAL AGE SHOULD REFLECT SEVERAL GENERAL PRECEPTS.

A. The Premature Imposition of Public Interest Obligations on Undeveloped Digital Services Should Be Avoided.

While digital technology will undoubtedly bring both new opportunities and challenges to television broadcasters, NAB emphasizes that the broadcast industry is only at the preliminary stage of the digital transition. It remains unclear how broadcasters will actually use their digital channels, and the choices are many. Digital broadcasters must decide whether to transmit high definition television ("HDTV") programming, multicast, datacast, or to offer some combination of these. Given the basic uncertainties as to the form that the new digital services will take, NAB believes it would be premature to establish public interest obligations for services that have yet to develop. Indeed, rules based only on speculative assumptions about the possible uses of DTV channels could, in the end, be completely inappropriate for the digital services that eventually emerge in the marketplace.

For these reasons, NAB strongly believes that rules pertaining to the public interest obligations of DTV broadcasters should not be adopted until digital services have been allowed to develop more fully. Rather than prematurely adopting such rules, the Commission should at this time be more concerned with insuring a successful and expeditious digital transition. As NAB has previously argued, the Commission can significantly contribute to the success and speed of the DTV transition by acting promptly on other matters relating to DTV. In particular, the Commission must act to adopt must carry regulations for DTV signals.[3] The Commission can additionally encourage the transition to digital broadcasting by implementing technical standards for making digital televisions compatible with cable systems.[4] Without Commission action on these two vital issues, the transition to DTV will be significantly impeded, and such delay will not serve the public interest.[5] Thus, NAB reminds the Commission that, before television broadcasters can fulfill any public interest obligations on their DTV channels, digital services must in fact have been given an opportunity to develop and flourish in the marketplace.[6]

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[3] As NAB explained in response to the Commission's *Notice of Proposed Rulemaking* on digital must carry, a timely and successful DTV transition cannot be achieved without the adoption of must carry rules insuring consumer access to all DTV broadcasts. *See* Comments of NAB in CS Docket No. 98-120 at 9-24 (filed Oct. 13, 1998).

[4] NAB has continually expressed its frustration with the inability of the cable industry and receiver manufacturers to reach agreement on interoperability issues. *See* Letter re CS Docket No. 98-120 from NAB, MSTV and ALTV to Chairman Kennard (Feb. 22, 2000). The Commission recently sought comment on a number of issues pertaining to the DTV transition, including cable compatibility and DTV receiver standards. *See Notice of Proposed Rulemaking* in MM Docket No. 00-39, FCC 00-83 (rel. March 8, 2000).

[5] *See Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12812 (1997) ("it is desirable to encourage broadcasters to offer digital television as soon as possible," given the "intense competition in video programming").

[6] As NAB noted in another proceeding, delay in the DTV transition will also frustrate the development of new wireless services on spectrum located in the 700 MHz bands (*i.e.*, reallocated television channels 60-69). *See* NAB Petition for Partial Reconsideration in WT Docket No. 99-168 (filed Feb. 22, 2000).

B. The Transition to Digital Transmission Technology Does Not Automatically Justify the Imposition of New Public Interest Duties, Particularly Those Not Reasonably Germane to Digital Broadcasting or Technology.

NAB also questions whether a shift in technology justifies the imposition of altered or new public interest duties generally. We do not believe, as the *Notice* seems to imply, that the mere use of digital transmission technology warrants the adoption of new and expanded public interest obligations. Other communications services have converted to digital technology without having to accept new public service obligations (or return spectrum or pay fees.)[7] Moreover, DTV could ultimately resemble television today, with most broadcasters providing viewers with one HDTV signal. If so, there would be no basis for altering broadcasters' existing public interest duties, which are currently based on the delivery of a single, free over-the-air television signal. Even the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee") agreed that, if broadcasters used their digital spectrum primarily for a single HDTV signal, the rationale for increased public interest obligations "would be diminished."[8]

More particularly, NAB asserts that the transition to DTV does not justify the imposition of any revised or new public interest duties for DTV that are not reasonably germane to digital broadcasting or technology.[9] As discussed in detail below, a number of the proposals in the

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[7] For example, cellular telephone licensees, many of whose channels were originally assigned by lottery rather than competitive bidding, are converting (or have already converted) from analog to digital technology. Although this conversion will result in up to an eight-fold increase in system capacity, these cellular licensees will not pay any fees, return any spectrum, or incur any other obligations due to their digital conversion.

[8] Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Final Report at 54 (Dec. 1998) ("Advisory Committee Report").

[9] After all, any Commission rule must bear some logical relationship to the underlying regulatory issue the rule purports to address. *See, e.g., ALLTEL Corporation v. FCC*, 838 F.2d 551, 559

Notice lack a reasonably direct relationship to DTV. Indeed, some of the proposals only incidentally relate to broadcasting *in any form*, but are in essence efforts to commandeer broadcasters to address perceived societal problems. NAB generally objects to the placement of burdens on broadcasters to pursue goals not directly related to broadcasting, and, in the context of this proceeding, specifically objects to the imposition of new public interest obligations for DTV broadcasters that lack a direct relationship to digital broadcasting.

C. Convergence in Telecommunications Technology Should Be Accompanied by Convergence in Regulatory Treatment.

For the past several years, communication technologies and services that were once regarded as separate have gradually converged.[10] The implementation of digital technology will only hasten this convergence, as, for example, it will allow broadcasters to transmit data, offer Internet access, and/or provide a multichannel video service. Convergence therefore promises increased competition between traditionally distinct service providers.

This technological convergence was, moreover, the impetus behind the Telecommunications Act of 1996 ("1996 Act"), which Congress primarily designed to end the legal barriers between various communications technologies and industries.[11] Because Congress

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(D.C. Cir. 1988) (court found a Commission rule affecting the determination of certain costs of local exchange carriers to be arbitrary and capricious, because Commission's decision had "no relationship to the underlying regulatory problem").

[10] Convergence has been defined as the "combination of both new and existing media – e.g., broadcasting, cable, fiber optics, satellites – into one integrated system for delivery of video, voice, and data." Meyerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Com. L. J. 251, 252 (1997), *quoting* Botein, *Antitrust Issues in the Telecommunications and Software Industries*, 25 Sw. U.L. Rev. 569, 569 (1996).

[11] For example, the 1996 Act lifted the legal barriers both to telephone company provision of cable and other video programming, and cable entry into the local telephone market. While local telephone companies were also permitted into the long distance telephone business, they were forced to open their markets for local service.

intended in the 1996 Act to end the "legal balkanization" that stood "in the path of technological convergence,"[12] the Commission's regulatory treatment of formerly disparate communications technologies should also converge as the technologies converge.

In particular, NAB believes that the Commission should not impose unequal burdens on different types of licensees, especially if they are competing in the same markets by offering the same services. The type of service offered by a licensee should determine the level of public interest obligations imposed, rather than the identity of the licensee. Thus, as discussed in greater detail below, if a broadcaster were to offer a data service, the public interest duties imposed on that broadcaster's service should be comparable to the obligations imposed on any other licensee's data service. The mere fact that a licensee may be a "broadcaster" does not automatically justify the imposition of greater public interest duties than those imposed on a non-broadcast licensee, if both licensees are providing similar services.

D. Extracting Additional Public Interest Concessions from DTV Broadcasters on the Basis of a *Quid Pro Quo* Is Unjustified.

A number of the proposals in the *Notice* appear based on the erroneous assumption that broadcasters were given valuable spectrum for free and that, in return, they should be made to pay in the form of new public interest obligations. NAB contends that the extraction of additional public interest concessions from DTV broadcasters cannot be justified on this *quid pro quo* theory.

As an initial matter, imposing payment for the digital channels in the form of expanded public interest duties seems contrary to the intent of Congress. In the 1996 Act, Congress had

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[12] Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Com. L. J. 1, 9 (1996). *See also* Meyerson, *Ideas of the Marketplace* at 252-53 (1996 Act envisioned a flexible, competitive and diverse telecommunications marketplace, which was to be made possible by convergence of technology).

the option of requiring broadcasters to pay for digital spectrum but declined to do so, evidently to "preserve and to promote the competitiveness of over-the-air broadcast stations."[13] Given this Congressional intent, the Commission should refrain from extracting payment under the guise of new and expansive public interest obligations.

In any event, NAB disputes the supposition that the grant of digital spectrum to broadcasters represents a "windfall" for which broadcasters must be made to pay in one form or another. As explained in detail below, digital television will not benefit broadcasters to such a greater extent than their analog channels that some additional recompense should be required.

First, DTV channels have not been awarded to broadcasters in perpetuity, but have merely been loaned for the length of the public's transition from analog to digital reception. As consumers adopt digital technology, broadcasters will return one channel, leaving them with the same six MHz assignment they now possess.[14] No other communications service that has adopted digital technology has returned even one MHz of spectrum.

Beyond returning valuable spectrum to the government, broadcasters will invest approximately $10-$15 billion (about $8-$12 million per station) in the equipment needed to convert their commercial stations to digital. Additional amounts will be needed to similarly convert noncommercial stations. And broadcasters will be required to invest these large sums, even though the additional revenue potential to be derived from digital broadcasting remains

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[13] H.R. Rep. No. 204, 104th Cong., 2d Sess. 48 (1995) (House Commerce Committee report on the 1996 Act).

[14] *See* 47 U.S.C. §§ 336(c); 309(j)(14). Moreover, defining the "core" DTV spectrum as including channels 2-51 will, at the end of the digital transition, permit recovery by the government of 108 MHz of spectrum – more than one fourth of the total spectrum used for broadcast television today. This spectrum will ultimately be auctioned and used by other services. *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268, 13 FCC Rcd 7418 at ¶ 45 (1998).

unclear.[15] Despite incurring these additional costs, with no promise of commensurate additional revenues, broadcasters are required to provide on their digital channel *free*, over-the-air television service, an obligation that is not now placed on analog television stations.[16] Given these factors, it is not surprising that an independent market research firm has concluded that, at the conclusion of the digital transition, broadcasters will have invested billions and lost market share from their present position.[17] Rather than expecting to receive a windfall from digital television, broadcasters in fact feel they must convert to digital technology to merely remain competitive in a video marketplace where all of their competitors will be digital.

Thus, no evidence exists that the grant of digital channels to broadcasters represents a giveaway or any form of unjust enrichment. Accordingly, there is no basis for imposing new and expansive public interest obligations as a *quid pro quo* for the temporary receipt of additional spectrum during the digital conversion, especially in light of Congress' intent to preserve free television and to "promote the competitiveness of over-the-air broadcast stations." H.R. Rep. No. 204, 104th Cong., 2d Sess. 48 (1995).

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[15] There is certainly no reason to expect advertisers to pay more for advertisements on a digital or HDTV signal, simply because it is not analog. In addition, advertiser-supported multicasting might only divide (rather than increase) a station's audience, thus providing no additional revenues. *See* discussion in Section II.A. below.

[16] Specifically, "broadcasters must provide a free digital video programming service the resolution of which is comparable to or better than that of today's service and aired during the same time periods that their analog channel is broadcasting." *Fifth Report and Order*, 12 FCC Rcd at 12820. If broadcasters do choose to provide subscription ancillary or supplementary services in addition to a free, over-the-air television signal, then they must pay significant fees. *See* 47 U.S.C. § 336(e) and the discussion in Section II.C. below.

[17] *See* Testimony of Josh Bernoff, Principal Analyst at Forrester Research, to Advisory Committee (Jan. 16, 1998).

E. Additional Public Interest Duties on Broadcasters Cannot Be Justified Unless the Evidence Demonstrates that the Existing Public Interest Standards Are Inadequate and that the Benefits of New Obligations Clearly Outweigh their Costs.

It is axiomatic that any Commission regulation must be supported by an adequate factual basis.[18] In light of the significant public interest obligations already imposed on broadcasters, additional public interest duties on analog or digital broadcasters can be justified only if the evidence demonstrates that these existing standards are inadequate and that the new duties would address these inadequacies.[19] As discussed in more detail below, the *Notice* makes numerous suggestions for revising or increasing the public interest duties of DTV broadcasters, but it contains scant evidence that the existing public interest standards are inadequate or that broadcasters are currently failing to serve the public interest. Rather, the evidence shows that broadcasters take their public service obligations very seriously indeed, and provide literally billions of dollars in community service. As set forth in NAB's 1998 report, the nation's broadcasters provided $6.85 billion in community service in 1996.[20]

Beyond needing to establish an evidentiary basis of the inadequacies of existing public interest standards, the Commission must also, to justify the adoption of increased obligations,

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[18] *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court concluded that rules restricting cellular providers from participating in certain spectrum auctions were arbitrary, because Commission had no factual support for them).

[19] *See, e.g., ALLTEL Corp.*, 838 F.2d at 560 (FCC's "facially plausible" claim that its rule on the costs of local exchange carriers prevented certain abuses ultimately failed to justify the rule because there was "no showing that such abuse" did in fact exist and "no showing that the rule target[ed] companies engaged in such abuse").

[20] This figure included $4.6 billion in donated air time for public service announcements, $2.1 billion raised for charities and causes by stations, and $148.4 million in free air time donated for candidate debates and forums. *See* NAB, *Broadcasters, Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* at 2 (April 1998) ("NAB Report"). The *Notice* (at ¶ 8) cites the NAB Report, acknowledging that "many broadcasters have served the public interest in numerous ways over the years."

demonstrate that the benefits of any new public interest duties outweigh the costs. While the *Notice* contains a veritable laundry list of obligations that conceivably could be required of broadcasters,[21] the *Notice* often fails to recognize that imposition of these proposals would entail very significant costs on broadcasters. As an initial matter, NAB does not believe that broadcasters should be required to bear the costs of funding such a wide variety of general public benefits, particularly (as discussed above) those relating to goals only tangentially connected to broadcasting. At the very least, the Commission should realistically assess the relative costs and benefits of its public interest proposals. And unless the Commission can show that the benefits generated by its proposals are sufficient to justify the costs imposed on broadcasters, then the Commission must refrain from imposing these additional public interest obligations.

F. In Considering Any Public Interest Obligations for DTV Broadcasters, the Commission Should Eschew Inflexible Regulation and Rely Primarily on Marketplace Forces.

NAB observes that several proposals in the *Notice* reflect an outmoded regulatory mindset. Indeed, certain proposals appear to suggest the virtual reinstatement of specific past policies, such as ascertainment, that the Commission has previously found unjustifiable and consequently eliminated.

NAB believes the Commission should resist calls to return to outdated regulatory models and policies. Such traditional approaches generally tend to rely on inflexible government regulations, and can prevent licensees from adapting to future marketplace developments or even

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[21] For example, broadcasters might be forced to provide datacasting to schools and libraries; increase the types of information included in their public files; use the Internet to interact with the public and discuss their programming with members of the public; bear mandatory minimum public interest requirements; and provide free time to political candidates.

generate counterproductive incentives for broadcasters.[22] Moreover, a return to old-fashioned regulatory policies would be contrary to the Commission's general approach for more than two decades of reducing regulatory burdens no longer appropriate to changing broadcast marketplace conditions, and relying more on market incentives to accomplish regulatory goals.[23] Particularly in an era of tremendous "growth in the number and variety of media outlets,"[24] NAB sees no basis for rejecting a general market-based regulatory approach and returning to less flexible and anachronistic regulatory policies.

G. Given the Deficiencies of the Scarcity Doctrine, the Constitutional Implications of Any Proposed Public Interest Obligations Must Be Carefully Considered.

The disparate treatment of the print and electronic media under federal regulation and the First Amendment has traditionally been justified on the grounds that broadcast frequencies are uniquely scarce. Specifically, the "scarcity doctrine" has been utilized to justify greater governmental control over, and the imposition of regulations on, broadcasters than could constitutionally be asserted over newspapers and other print media.[25] Along with a great many

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[22] *See, e.g.*, Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 938 (1997); Hazlett and Sosa, *Was the Fairness Doctrine a "Chilling Effect"?*, 26 J. Legal Stud. 279, 292-99 (1997) (the supply of informational programming formats (news, talk, news/talk, and public affairs) in the AM and FM radio markets exploded both absolutely, and as a proportion of all formats, after abolishment of the Fairness Doctrine in 1987, thereby indicating that the doctrine had acted as a disincentive to the airing of potentially controversial speech).

[23] The Commission began to reform many of its programming related broadcast regulations well over twenty years ago. *See, e.g., Further Notice of Inquiry and Notice of Proposed Rulemaking* in Docket No. 19715, 53 FCC 2d 3 (1975) (establishing experimental exemption from formal ascertainment requirements for small market radio and television license renewal applicants); *Notice of Inquiry and Proposed Rulemaking* in BC Docket No. 79-219, 73 FCC 2d 457 (1979) (setting forth various proposals for substantially deregulating commercial radio industry).

[24] *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 1 (1999).

[25] *See, e.g., Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) (upholding constitutionality of Fairness Doctrine).

jurists and scholars, NAB believes that this "scarcity doctrine" is illogical and factually unsupportable, and therefore deficient as a legal basis for depriving broadcasters of full First Amendment protection. Thus, the Commission must be cautious in imposing new public interest obligations on broadcasters that implicate the First Amendment, as the Commission may be unable to rely on the traditional basis for establishing the constitutionality of any such obligations.

As numerous jurists and commentators have pointed out, broadcast frequencies are not uniquely scarce.[26] All economic goods are scarce, including the materials necessary for the production of newspapers. Yet the print media, unlike broadcasters, have not been subject to regulatory schemes that intrude into First Amendment territory. Since scarcity is a universal fact, it cannot be the basis for justifying regulation in one context but not in another. As the Commission itself has recognized:

> All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. . . . Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.[27]

Even beyond the illogic of the scarcity argument in the economic sense, it is clear that broadcast and other media outlets are much less scarce in a numerical sense today than in 1969 when the Supreme Court gave definition to the scarcity doctrine in *Red Lion*. Not only has the

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[26] *See, e.g., Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508-9 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 728 n.2 (1997) (Williams, J., dissenting from denial of rehearing *en banc*); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting), *cert. denied*, 516 U.S. 1043 (1996); Hazlett, *Physical Scarcity* at 910.

[27] *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987) (concluding that Fairness Doctrine violated First Amendment and did not serve the public interest), *affirmed, Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J. concurring), *cert. denied*, 493 U.S. 1019 (1990) ("spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory").

number of broadcast facilities exploded,[28] but the vast increase in the number and variety of nonbroadcast outlets (including cable, Direct Broadcast Satellite and the Internet) makes the idea of "scarcity" of media voices seem almost quaint. This expansion in the number and variety of media outlets should increase further as technology continues to improve, which will permit more efficient use of spectrum. Indeed, the transition to digital broadcasting should lead to even greater abundance of broadcast channels and program options. Thus, NAB agrees with the Commission when it previously concluded that "there is no longer a scarcity in the number of broadcast outlets" available to the public.[29]

If, as the Commission explicitly recognized in *Syracuse Peace Council*, the scarcity doctrine is no longer logically or empirically valid, then the Commission must be cautious in relying on *Red Lion* and its jurisprudential progeny to justify the imposition of any new public interest obligations that implicate the First Amendment. *Red Lion*'s factual predicate is clearly the scarcity of broadcast frequencies. *See* 395 U.S. at 390, 398-99 n.25, n.26, 400.[30] In the absence of such a predicate, the rationale for upholding government regulations implicating the

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[28] The number of television, AM, and FM stations has increased by 85% since 1970. *See Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 29 (1999).

[29] *Syracuse Peace Council*, 2 FCC Rcd at 5054. Numerous jurists and scholars have also expressed agreement with this assessment. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (concurring opinion); *Telecommunications Research and Action Center*, 801 F.2d at 508 n.4; Hazlett, *Physical Scarcity* at 911; Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998).

[30] *See also FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) (cases similarly relying on spectrum scarcity as the basis for less First Amendment protection of broadcasting).

First Amendment rights of broadcasters becomes at best unclear.[31] Given this questionable status of the traditional approach for evaluating the constitutional implications of broadcast regulations, the Commission should exercise restraint in adopting new public interest obligations that raise clear First Amendment concerns.

II. A NUMBER OF THE SPECIFIC PROPOSALS SET FORTH IN THE *NOTICE* ARE PREMATURE, UNRELATED TO DIGITAL BROADCASTING, UNDULY BURDENSOME, LACKING IN EVIDENTIARY SUPPORT OR CONSTITUTIONALLY SUSPECT.

A. The Imposition of Public Interest Rules Pertaining to Multicasting Would Be Premature.

In establishing the statutory framework for the transition to DTV, Congress made clear in Section 336 of the Communications Act that television broadcast stations in the digital environment remain obligated "to serve the public interest, convenience, and necessity." 47 U.S.C. § 336(d). In implementing Section 336, the Commission put broadcast licensees on notice "that existing public interest requirements continue to apply" to them.[32] These public interest requirements have traditionally been applied to broadcasters providing a single analog signal carrying one video program. It remains unclear how these public interest programming duties should apply in a digital environment, where broadcasters will have the ability to multicast

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[31] Indeed, the Supreme Court has clearly suggested that it might "reconsider" its "longstanding approach" to evaluating the constitutionality of broadcast regulations, if Congress or the Commission "signal[ed] . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *League of Women Voters*, 468 U.S. at 376 n.11.

[32] *Fifth Report and Order*, 12 FCC Rcd at 12830. Thus, DTV broadcasters must, for example, air programming responsive to their communities of license, comply with the statutory requirements concerning political advertising and candidate access, and provide children's educational programming.

(*i.e.*, broadcast several video programming streams on a single digital channel). The *Notice* (at ¶ 11) requested comment on this issue.

The basic question with regard to multicasting is whether a licensee's public interest obligations attach to the DTV channel as a whole, or instead to each program stream offered by the licensee. *See Notice* at ¶ 11. NAB thinks it would be inappropriate to impose the full panoply of public interest obligations on all of the program streams that a multicasting broadcaster might offer. In particular, the full range of generalized public interest obligations should not be required on the specialized program streams that a broadcaster might offer.[33] NAB realizes, however, that the Commission may be reluctant to allow all public interest related programming to be placed on a single stream of a multicasting broadcaster, especially if the broadcaster is offering several general interest programming streams.

In considering these various factors, the Commission should recognize that, if multicasting does increase the total number of programming options available to viewers, then it becomes less necessary for each programming stream to carry all types of public interest programming. In a diverse multicasting environment, viewers will benefit from the increased number and variety of programming offerings across the market, and the Commission should be less concerned with insuring that every single programming stream offers every category of programming.[34] Due to the increase in diversity of program offerings in a multicasting

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[33] For example, it would make little sense to require a broadcaster to air children's programming on a specialized stream devoted to business news. Conversely, if a broadcaster were to offer a specialized children's programming stream, then that broadcaster should not be required to carry children's programming on all of its other programming streams.

[34] In previously eliminating quantitative programming guidelines for both television and radio stations, the Commission similarly recognized that audiences benefited by an increased diversity of program offerings across the market and that individual stations did not necessarily need to present programming of all types. *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d

environment, regulations requiring every programming stream of a broadcaster to carry all types of public interest programs would appear unnecessary. Indeed, such inflexible regulations could discourage broadcasters from engaging in innovative multicasting services.[35]

With regard to Section 336(d), about which the Commission specifically inquired, NAB is not persuaded that this language directly pertains to multicasting.[36] Rather, this language applies on its face to licensees providing ancillary or supplementary services. Such a licensee seeking renewal needs to establish that its program services are in the public interest, and that its non-program ancillary and supplementary services are conducted in accordance with the rules applicable to those services. Thus, this section most directly addresses DTV broadcasters who offer both program services and non-program ancillary services, and does not provide any clear guidance as to how existing program-related public interest obligations should be applied to licensees who multicast multiple program services.

In any event, this discussion of the application of public interest duties to multicast programs remains entirely theoretical at this time. Broadcasters may ultimately choose not to multicast at all, but instead decide to broadcast primarily one HDTV signal, in which case broadcasters' existing public interest duties should not be altered. *See* Section I.B. above.

1076, 1087-88 (1984); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983).

[35] For example, a broadcaster considering whether to engage in multicasting (or whether to use its digital spectrum in some other manner) might be reluctant to offer three, four or five programming streams, if that tripled, quadrupled or quintupled its public interest programming requirements.

[36] The language at issue provides: "In the Commission's review of any application for renewal of a broadcast license for a television station that *provides ancillary or supplementary services*, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license." 47 U.S.C. § 336(d) (emphasis added).

Broadcasters might also choose to multicast multiple standard definition program streams during only part of the day and broadcast a single HDTV signal at other times (such as prime time). NAB believes that the Commission would be better able to formulate appropriate public interest rules for multicasting if such rules reflected the actual services offered by broadcasters. Indeed, it as yet remains unknown whether multicasting will be viable commercially. Multicasting might in fact only divide a station's existing audience, rather than increase it, in which case advertiser-supported multicasting would have no additional revenue producing potential.[37] Moreover, multicasting could substantially increase a broadcaster's programming costs. Given the speculative nature of any multicasting service at this time, NAB advises the Commission to refrain from adopting rules imposing special public interest obligations (including with regard to children's programming) on multicasting, until such services actually develop.[38]

B. The Current Television Ratings System Is Voluntary and Should Remain Unchanged in the Digital Environment.

The *Notice* (at ¶ 12) suggests that the current voluntary television ratings system could be improved by adding new and/or different information in the digital environment. Because the existing V-Chip technical standards for the ATSC DTV system were crafted at a time when only the current television ratings system had been approved by the Commission, those V-Chip standards were written to support only that ratings system in the United States. Thus, NAB

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[37] *See* Advisory Committee Report at 54 ("it is conceivable that broadcasters who apply multiplexing will simply cannibalize their single signal, achieving no additional revenues or perhaps merely stabilizing current market share").

[38] The Commission should not be overly concerned that some broadcasters might start to offer multicasting services prior to the adoption of special public interest obligations concerning such services. After all, DTV broadcasters will remain subject to the existing public interest programming obligations.

believes that the suggestion to alter the current voluntary ratings system would only serve to delay needlessly the introduction of digital televisions with V-Chip technology.

Specifically, the existing DTV V-Chip technology has two components: a Ratings Region Table ("RRT") and a Content Advisory Descriptor ("CAD") packet. The RRT contains a description of the rating system used in a specific country. RRTs are broadcast relatively infrequently, and they tell DTV receivers about the entire set of ratings that can be applied to a program. In the United States, for example, RRTs will contain a description of the existing Television Parental Guidelines as voluntarily adopted by the television industry and approved by the Commission. The CAD packet carries the actual rating assigned to a specific program. When a DTV set receives a CAD, it will check its contents against the RRT to ensure that the rating is valid. The DTV receiver will then react to the program based on how the consumer has programmed the television set (*e.g.*, block the program if it has a certain rating).

The manufacturers of DTV sets are just now beginning to include in their products V-Chips that function as described above.[39] If the V-Chip standard were to be changed to include the carriage of more or different types of information (as the *Notice* suggests), then DTV receivers would likely have to be re-engineered to support the altered digital V-Chip standard. This process of both setting a new digital V-Chip standard and then producing DTV receivers in accordance with the revised standard would doubtless consume considerable time. As a result, the alteration of the current ratings system would serve only to stall the current installation of V-Chips in DTV sets and delay the overall introduction of V-Chips in the digital marketplace.

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[39] *See* Expedited Petition for Rulemaking in ET Docket No. 97-206 filed by the Consumer Electronics Association (Jan. 12, 2000) (asking the Commission to incorporate into its rules the existing DTV V-Chip standard, EIA-766).

In any event, NAB notes the inherent contradictions of proposals suggesting any *required* changes to a *voluntary* ratings system. NAB submits that the Commission lacks the authority to specify changes to the current voluntary system and to force broadcasters to institute those changes. Under Section 551 of the 1996 Act, the Commission's role was only to determine whether an industry-adopted ratings system was "satisfactory." Once it did so, its role in the development of the ratings system was at an end, and Congress gave no hint that it intended the Commission to have any continuing role in the operation of the ratings system. We particularly object to the suggestion that the Commission could impose limits on commercial speech in relation to the voluntary ratings system. *See Notice* at ¶ 12. Specifically, an attempt to prevent broadcasters from running advertisements for television programs that have ratings different from the rating of the program during which the advertisements run would constitute a content-based speech restriction. Under current commercial speech doctrine, any such restrictions on the advertising of television programming implicates serious First Amendment concerns.[40]

C. Ancillary and Supplementary Services Offered by DTV Broadcasters Should Be Subject to the Same Public Interest Requirements as Comparable Services Offered by Non-Broadcasters.

In implementing Section 336, the Commission determined to "allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services."[41] The *Notice* (at ¶ 13) requested comment on whether public interest obligations should apply to ancillary and supplementary services, and if so, how.

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[40] *See, e.g., Greater New Orleans Broadcasting Association, Inc. v. U.S.*, 119 S.Ct. 1923 (1999) (finding that federal statute and implementing FCC regulation prohibiting broadcasters from carrying advertisements about privately operated commercial casino gambling violated First Amendment).

[41] *Fifth Report and Order*, 12 FCC Rcd at 12821. These services are those other than free, over-the-air services, and could include, but are not limited to, Internet access, computer software

Because Congress generally intended to end the differentiated legal treatment of converging technologies in the 1996 Act (*see* Section I.C. above), NAB believes that any ancillary or supplementary services offered by DTV broadcasters should be subject to the same public interest obligations as comparable services offered by non-broadcasters. It is the type of service offered – rather than the label attached to the licensee – that should determine the type of public interest duties that apply. Accordingly, if a DTV broadcaster were to offer an Internet access service, the public interest obligations applicable to that service should be comparable to those applied to any other licensee's Internet access service, even if a non-broadcaster. The terms of Section 336 clearly support NAB's position.

Section 336(b)(3) requires the Commission to apply to any ancillary or supplementary service "such of the Commission's regulations as are applicable to the offering of analogous services by any other person." 47 U.S.C. § 336(b)(3). Thus, Congress has explicitly directed the Commission to regulate any ancillary or supplementary services offered by DTV broadcasters in the same manner as comparable services offered by non-broadcasters. Congress has additionally recognized that traditional programming-related public interest obligations do not readily transfer to ancillary and supplementary services, which will generally be non-video. Section 336(d) provides that a DTV licensee providing ancillary or supplementary services shall, upon renewal, "establish that all of its *program* services on the existing or advanced television spectrum are in the public interest." 47 U.S.C. § 336(d) (emphasis added). Contrarily, with regard to non-program ancillary or supplementary services, Section 336(d) states that "[a]ny violation of the Commission's rules applicable" to them "shall reflect upon the licensee's qualifications for

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distribution, data transmissions, teletext, interactive services, aural messages, paging services, audio signals or subscription video.

renewal of its license." *Id.* These sections, taken together, establish that Congress intended broadcasters' ancillary and supplementary services to be subject to the same regulations applicable to analogous services offered by other licensees, including with regard to public interest obligations. This congressional intention "is the law and must be given effect" by the Commission.[42]

NAB does not agree that Section 336(a)(2) implies that the traditional program-related public interest standard applies to ancillary and supplementary services offered by DTV broadcasters. That section provides that, if the "Commission determines to issue" licenses for "advanced television services," the Commission shall "allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." 47 U.S.C. § 336(a). NAB does not believe that this section even addresses the applicability of existing public interest obligations to ancillary and supplementary services. Rather, Section 336(a) directs the Commission, if it issues licenses for advanced television services at all, to determine whether allowing DTV licensees to offer ancillary or supplementary services would be in the public interest. Section 336(a), then, speaks to an initial determination by the Commission of whether DTV licensees should even be *allowed* to offer ancillary or supplementary services. Once the Commission has determined that allowing these licensees to offer ancillary or supplementary services would serve the public interest,[43] then the entirely separate question concerning the type of public interest duties that attach to these services arises. And, as NAB has set forth above, the type of public interest obligations

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[42] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 and n. 9 (1984).

[43] The Commission made this determination in the *Fifth Report and Order*, 12 FCC Rcd at 12820-23.

applicable to ancillary or supplementary services offered by DTV licensees should be the same as the public interest standards "applicable to the offering of analogous services by any other person." 47 U.S.C. § 336(b)(3).[44]

NAB's position is also buttressed by Congress' determination to require DTV licensees who offer ancillary or supplementary services on a subscription basis to pay fees. Section 336(e) directs the Commission to establish a program to assess and collect fees from licensees offering ancillary or supplementary services to recover for the public (1) a portion of the value of the public spectrum resource made available for commercial use; and (2) an amount equaling, over the term of the license, the amount that would have been recovered had the ancillary and supplementary services been licensed by competitive bidding. 47 U.S.C. § 336(e). In implementing these provisions, the Commission has determined that DTV broadcasters must pay fees representing 5% of gross revenues received from ancillary or supplementary uses of the DTV spectrum for which broadcasters receive compensation other than advertising revenues used to support broadcasting. *Report and Order* in MM Docket No. 97-247, FCC 98-303 (1998). Because broadcasters offering ancillary and supplementary services will be obliged to make these fee payments equivalent to the cost of acquiring a license to provide such service at auction, broadcasters should not be subject to public interest obligations more burdensome than other licensees providing comparable services who may have received their licenses by auction.[45]

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[44] Thus, DTV licensees who choose to datacast should not be required to transmit information on behalf of schools, libraries or other community or public safety institutions unless similar obligations are imposed on nonbroadcasters who offer comparable datacasting services.

[45] Consider, for example, auction winners for licenses in the 700 MHz bands, who may use the spectrum to provide a variety of wireless services, including high speed Internet access. To qualify for a renewal expectancy, these licensees need only demonstrate that they have provided substantial service during the previous license term and have substantially complied with

Beyond the statutory requirements discussed above, regulatory parity between DTV broadcasters providing ancillary and supplementary services and other licensees providing similar services is also sound policy. The Commission has previously recognized that permitting broadcasters to develop additional revenue streams from innovative digital services would help support free over-the-air broadcast programming. *See Fifth Report and Order*, 12 FCC Rcd at 12820-21. The imposition of unequal public interest obligations on broadcasters' ancillary and supplementary services will discourage broadcasters from offering such services in competition with licensees not subject to such burdens. Requiring undue public interest duties – in addition to the fees already imposed – will discourage the emergence of innovative ancillary and supplementary services that could help broadcast television to remain a strong presence in the increasingly competitive video programming market. Failure to insure regulatory parity will thus ultimately undermine the "overarching goal" of the Commission's digital television proceeding – "to promote the success of a *free*, local television service using digital technology." *Id.* at 12820.

D. The Existing Disclosure Obligations of Broadcasters Are in No Way Inadequate.

The Commission's rules currently require commercial television broadcasters to include in their local public inspection files, *inter alia*, citizen's agreements; records concerning broadcasts by political candidates; annual EEO public file reports; letters and e-mails from the public; quarterly issues/programming lists; any material relating to a Commission investigation or complaint; records concerning children's programming commercial limits and children's television programming reports; and applications filed with the Commission and statements

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Commission rules, policies and the Communications Act of 1934. *See* 47 C.F.R. § 27.14 and *First Report and Order* in WT Docket No. 99-168, FCC 00-5 at ¶ 68 (rel. Jan. 7, 2000).

regarding petitions to deny filed against those applications. These rules are intended to facilitate citizen monitoring of station operations and to foster community involvement with local stations. The *Notice* (at ¶¶ 15-16) sought comment on suggestions for requiring additional disclosures in stations' public files (such as more detailed information about a variety of types of programming and activities) and for requiring broadcasters to ascertain community needs by certain specified means.

As an initial matter, we see no logical connection between any proposed increases in broadcasters' disclosure obligations and their transmission of a digital, rather than an analog, signal. The transition from analog to digital technology bears no relation to the type of information that broadcasters should be required to disclose or maintain in their public files.

In addition, the *Notice* cited no evidence tending to show that the existing disclosure obligations of television broadcasters are in any way inadequate or ineffective. Indeed, less than two years ago the Commission conducted a rulemaking to, *inter alia*, clarify and update its rules pertaining to the required contents of broadcasters' public files.[46] The Commission in that proceeding offered no suggestion that its current rules required the disclosure of an inadequate amount of information or that different substantive disclosure requirements would be preferable. NAB accordingly sees no basis in this proceeding for proposals to increase the public disclosure obligations applicable to television broadcasters, regardless of whether they transmit a digital or analog signal. With regard to the specific suggestion (*see Notice* at ¶ 16) that the public file contain information on what programming has closed captioning and video description, NAB

[46] The Commission amended its rules to remove out-of-date references and to clarify its requirements, including with regard to the retention periods for materials in the public file. The Commission in fact shortened the retention periods for certain materials, including FCC applications. *See Report and Order* in MM Docket No. 97-138, 13 FCC Rcd 15691 (1998)

reminds the Commission that it previously rejected requests to adopt recordkeeping or reporting requirements with respect to closed captioning.[47] The *Notice* presented no basis for altering this determination.

NAB also notes the striking similarity between certain proposals in the *Notice* and policies that the Commission has previously rejected. In 1984, the Commission eliminated its formal ascertainment requirements for commercial television stations.[48] These ascertainment rules had set forth specific standards for broadcasters on consulting with community leaders, identifying and responding to community needs through programming, and maintaining records on their ascertainment procedures. The proposal in this proceeding for broadcasters to ascertain community needs, by reaching out to citizens and local leaders via the postal service, e-mail and broadcast announcements (*see Notice* at ¶ 15), should not be considered for the same reasons that the Commission previously eliminated its ascertainment rules.

In its 1984 order, the Commission eliminated formal ascertainment procedures for commercial television broadcasters because it had "no evidence that these procedures" actually ensured that licensees discovered the needs of their communities and responded to these needs in their programming choices. *Ascertainment and Program Guidelines Order*, 98 FCC 2d at 1098. The Commission also found that "market forces provide[d] adequate incentives for licensees to

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("*Public File R&O*"), *recon. granted in part, Memorandum Opinion and Order*, FCC 99-118 (1999).

[47] *See Order on Reconsideration* in MM Docket No. 95-176, 13 FCC Rcd 19973 at ¶ 118 (1998) (with regard to its captioning requirements, the Commission declined to "adopt recordkeeping or reporting requirements as they would impose unnecessary administrative burdens on video programming distributors and the Commission").

[48] *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part, ACT v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("*Ascertainment and Program Guidelines Order*").

remain familiar with their communities," and that "future market forces, resulting from increased competition, will continue to require licensees to be aware of the needs of their communities." *Id.* at 1099. Thus, the Commission concluded that "the benefits of the ascertainment requirements" did not "justify the costs of this procedure." *Id.* at 1100.

All the reasons cited by the Commission for eliminating its ascertainment requirements for television broadcasters in 1984 still apply today. Given the ever-increasing competitiveness of the video marketplace, "[c]ommercial necessity dictates that the broadcaster must remain aware of the issues of the community or run the risk of losing its audience." *Id.* at 1098-99. Because it is in the "economic best interest of the licensee to stay informed about the needs and interests of its community," *id.* at 1101, formal ascertainment requirements are unnecessary and, in view of the burdens they impose on broadcasters, inappropriate.[49] Moreover, given the lack of evidence presented in this proceeding (and in past proceedings pertaining to ascertainment) that formal and documented ascertainment procedures actually result in broadcast programming more responsive to community needs, the consideration of a new ascertainment rule for DTV broadcasters would be wholly unjustified.[50]

The *Notice* (at ¶ 17) also inquired about the posting of public files on the Internet and on the general use of the Internet to improve the responsiveness of broadcasters to the needs of the public. With regard to the Commission's request for comment on whether broadcasters should be required to make their public files available on the Internet, NAB reminds the Commission

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[49] Even without any ascertainment requirement mandating that broadcasters consult with local leaders, more than 75% of broadcast stations say that they do consult with local community leaders in deciding which issues and causes to address. Fully 85% of stations say they involve local businesses in their community service campaigns. *See* NAB Report at 3, 8.

that it quite recently addressed this issue. In its 1998 proceeding concerning the public file rules, the Commission determined to give stations the voluntary option of maintaining all or part of their public inspection files in a computer database rather than in paper files. The Commission also encouraged, but did not require, stations that elected this option to post their electronic public files on any World Wide Web sites they maintained. *See Public File R&O*, 13 FCC Rcd 15691 at ¶ 53. NAB agrees with this determination, and sees no reason for the Commission to alter this recent decision. Obviously, the mere fact that a broadcaster is, or may soon be, transmitting a digital, rather than analog, signal is no sound basis for forcing a broadcaster to make all public files available on the Internet.

Moreover, the burdens associated with converting a station's public file from paper into an electronic format, and then posting these electronic files on a Web site, could be considerable and would not be justified by correspondingly substantial benefits. A station's public file can easily fill a file cabinet (not just a single file folder). Converting such substantial amounts of paper into an electronic format for posting on the Web, as well as creating, updating and otherwise maintaining the Web site, will constitute a not insubstantial burden, especially for small broadcasters with limited personnel resources. These costs and burdens are clearly not outweighed by the limited benefits of requiring an electronic public file to be posted on the Web. The most outstanding characteristic of the World Wide Web is indeed its "worldwide" reach. However, the Commission has expressly recognized that a station's local public inspection file is intended to serve the *local* viewers and listeners of each station, and that persons outside a station's geographic service area have a less compelling interest in access to that station's public

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[50] *See Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (court found broadcast integration policy to be arbitrary and capricious, because Commission had "no evidence to indicate" that the policy achieved "even one of the benefits that the Commission attribute[d] to it").

file.[51] Thus, posting stations' public files on the Internet offers little additional public benefits, because persons outside a station's service area have limited interest in that station's performance and persons inside a station's service area already have reasonable access to the local public file.

For similar reasons, broadcasters should not be required to create new, or maintain existing, Web sites for the express purpose of interacting directly with the public, "perhaps by establishing forums in which the public could post comments and engage in an ongoing dialogue about the broadcaster's programming." *Notice* at ¶ 17. As described above, the market provides incentives for broadcast licensees to stay informed about the needs and interests of their communities. If broadcasters find that maintaining Web sites for the purpose of communicating with viewers help them become better informed about their communities, then broadcasters will have the incentive to voluntarily create Web sites and use them for that purpose. Broadcasters certainly need not establish formal "forums" in order to enable the public to send comments and suggestions to stations via e-mail.[52] NAB fails to see why broadcasters, as a matter of federal

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[51] *See Memorandum Opinion and Order* in MM Docket No. 97-138, FCC 99-118 at ¶¶ 12-15 (1999) (although stations with main studios located outside their communities of license must generally honor any requests for public file documents made by telephone, the Commission expressly limited this telephone request rule to require the mailing of documents only to individuals within the geographic service area of the station; this limitation was consistent with "ensuring the continued access of *local* viewers and listeners of each station") (emphasis added). *See also* NAB, Petition for Partial Reconsideration and Clarification in MM Docket No. 98-204 (filed March 16, 2000) (noting Commission's position that the public file is intended to be available for the public that the station serves).

[52] In fact, Commission rules currently require e-mails from the public concerning station operations be retained in stations' public files for three years. *See* 47 C.F.R. § 73.3526(e)(9).

government policy, should be required to set up and maintain Internet chat rooms. And in any event, this proposal raises a number of practical and legal issues.[53]

NAB also opposes the suggestion that broadcasters should be required to disclose information (on a Web site or by other means), such as the identity of "the individual ultimately responsible for a program's airing or content." *Notice* at ¶ 17. Of course stations may disclose such specific personnel information if they wish, but NAB believes this proposal raises potential privacy and security concerns, given the number of incidents in which broadcast station employees have been subject to threats or even violence.[54] And since the *licensee* is responsible for all programming, this proposal would appear to serve little purpose.

Finally, NAB finds all the suggestions in the *Notice* as to broadcasters posting information and interacting with the public via Web sites to be somewhat puzzling, given the Commission's apparent belief about the inaccessibility of the Internet to certain communities. In its very recent order setting forth new Equal Employment Opportunity requirements, the Commission rejected a proposal to allow broadcasters to satisfy their employment outreach obligations by posting job vacancies on centralized Web sites. In rejecting this Internet job bank proposal, the Commission concluded that Web posting was not "sufficient to ensure wide dissemination to all segments of the community." *Report and Order* in MM Docket Nos. 98-204 and 96-10, FCC 00-20 at ¶ 86 (rel. Feb. 2, 2000). The Commission additionally emphasized that

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[53] For example, would stations be required to respond to the e-mail messages through these "forums"? And would licensees be expected to alter their programming in response to any messages objecting to certain programs? If so, how would a broadcaster be expected to weigh these concerns, and how would its compliance with such requirements be measured?

[54] For example, late last year, the group Public Citizen issued a report documenting cases in which mentally ill people threatened television and radio station employees. In a few of those cases, station employees were killed. Early this year, police in Spartansburg, South Carolina charged a man with stalking a television journalist and sending obscene messages to several anchors at area television stations. *See Broadcasting and Cable* at 40 (Jan. 10, 2000).

"access to computers is not universal and this digital divide affects minorities and those living in rural areas to a greater extent than other segments of the population." *Id.* If the Commission believes that the "digital divide" is such a serious problem, then it should not consider requirements forcing broadcasters to post their public files on Web sites or to otherwise utilize the Internet in communicating with the public. After all, the purpose of the public inspection file is to facilitate citizen monitoring of station operations and performance, foster community involvement with local stations, and ensure that stations are responsive to the needs and interests of their communities. If certain segments of the community, such as minority groups, lack reasonable access to computers and the Internet, then the Commission should refrain from requiring stations to utilize the Internet to interact with the public, as such requirements would disadvantage the very groups that the Commission wants broadcasters to serve more effectively.

In sum, therefore, NAB sees no basis for altering the existing public disclosure obligations of television broadcasters, merely because of the transition to digital technology. NAB supports voluntary use of the Internet by broadcasters to improve communications with the communities they serve, but believes that mandatory requirements regarding information to be placed on Web sites are inappropriate. As the Internet continues to develop and access to the Internet becomes even more widespread, market forces will no doubt provide increased incentives for broadcasters to incorporate the Internet in many of their basic broadcast and business activities, including community outreach.[55]

E. Nothing Inherent in Digital Technology Necessitates Changes to the Current Emergency Alert System.

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[55] One study estimates that U.S. households with Internet access will nearly double to 90 million by the end of 2004, from 46.5 million today. *See* Communications Daily at 10 (Feb. 9, 2000) (citing prediction from Strategis Group).

The *Notice* (at ¶¶ 18-19) sought comment on the "unique capabilities" of digital technology for the delivery of disaster-related information, and how broadcasters could be encouraged to deploy such technology to deliver enhanced disaster information (such as pinpointing specific neighborhoods at risk). The *Notice* also referred to the recently adopted Emergency Alert System ("EAS") requirements, and asked whether the Commission should adopt any different EAS requirements for DTV broadcasters. Overall, NAB questions whether the current transition to digital broadcasting necessitates changes to the recently adopted EAS requirements, and whether these disaster warning issues are best considered in this general public interest proceeding.

In response to the *Notice*'s reference to disaster warnings that identify specific neighborhoods at risk, NAB points out that the EAS, in its current form, does have the ability to provide "Specific Area Messaging." That is, under the current system, EAS messages can be targeted, if not to specific neighborhoods, at least to specific geographical areas ("EAS locations"), which are defined by the National Weather Service ("NWS"). If the Commission wishes to change or enhance this particular feature of the EAS, it should do so in cooperation with the NWS, as well as the federal, state and local emergency management officials that participated in the current system's creation.

Moreover, while it is true that DTV signals can carry considerably more information than NTSC (analog) television signals, there are no "unique capabilities" in the ATSC DTV system that can specifically be used to enhance the delivery of disaster-related information. The Commission should therefore commence a rulemaking proceeding to explore improvements to the EAS *only* if there are improvements that *need* to be made, and not simply because DTV (like the proverbial mountain) is there. In considering any such proceeding, the Commission should

work with its EAS National Advisory Committee, the Federal Emergency Management Administration, NWS, and state and local emergency management agencies to obtain recommendations for improvements to the EAS. This general inquiry into the public interest obligations of DTV broadcasters would not appear to be the appropriate forum for consideration of changes to the EAS.[56]

Finally, NAB points out that, regardless of whatever disaster-related information might ultimately be thought desirable for DTV broadcasters to provide, DTV receivers must be capable of receiving and supporting this additional information. As the Advisory Committee recognized, the "appropriate regulatory authorities [must] work with manufacturers of digital television sets to make sure that they are modified appropriately to handle these kinds of [emergency] transmissions." Advisory Committee Report at 61. It would not serve the public interest for the Commission to require broadcasters to send enhanced disaster-related information in their DTV signals, if the DTV receivers available on the market do not enable consumers to receive and access this enhanced information.

F. Mandatory Minimum Public Interest Obligations Are Unnecessary and Would Improperly Infringe on Broadcasters' Editorial Discretion.

The Advisory Committee Report (at 47-48) recommended that the Commission "adopt a set of mandatory minimum public interest requirements for digital broadcasters." These

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[56] NAB also questions the evidentiary basis for the *Notice*'s queries about the provision of enhanced disaster warnings by DTV broadcasters. The sole testimony relating to disaster information before the Advisory Committee was by Dr. Peter Ward, of the U.S. Geological Survey. Dr. Ward urged the Advisory Committee to recommend reserving a very small amount of bandwidth for a stream of official information about natural disasters. Interestingly, his testimony did not focus solely on television broadcasters, but rather emphasized that this emergency information could be made available through "any variety of receivers" and technologies, including, for example, cellular phone technology. *See* Testimony of Dr. Peter Ward to Advisory Committee (Jan. 16, 1998).

minimum standards should apply to "areas generally accepted as important universal responsibilities for broadcasters," but the Advisory Committee could not agree "about what those standards should be, or what form they should take." In particular, members of the Advisory Committee had "sharply different views about the specificity of minimum standards," with some members endorsing "detailed standards with defined numerical guidelines," while others (even those who endorsed the concept of minimum standards) objected strongly to the idea of detailed standards with numerical quotas. The Advisory Committee ultimately recommended several categories for establishing minimum standards for digital broadcasters.[57] The *Notice* (at ¶¶ 20-22) sought comment on the Advisory Committee Report's recommendations, and asked whether the Commission should establish specific minimum requirements regarding television broadcasters' public interest obligations.

Overall, NAB believes that detailed public interest standards with numerical quotas reflect an outdated model of regulation that is particularly inappropriate for the digital era. "One size fits all" numerical quotas will simply not fit the diverse character of DTV stations, which will likely vary widely in the types of services they will ultimately offer. NAB also believes that the Commission has no basis upon which to consider the adoption of inflexible, numerical requirements which, given the competitive nature of the video programming marketplace, are unnecessary and improperly infringe on the editorial discretion of broadcast licensees.

As an initial matter, NAB notes that the proposal to consider specific, numerical public interest requirements resembles policies that the Commission has either (1) previously declined to adopt, or (2) previously eliminated. For example, the Commission previously declined to

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[57] These categories include: (i) community outreach; (ii) accountability; (iii) public service announcements; (iv) public affairs programming; and (v) closed captioning. *See* Advisory Committee Report at 48.

adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings. *See Report and Order* in Docket No. 19154, 66 FCC 2d 419 (1977) ("*Comparative Renewal R&O*"). The Commission in that proceeding concluded that quantitative programming standards were a "simplistic, superficial approach to a complex problem," and that adoption of such standards would not improve the quality or efficiency of the comparative renewal process. *Id.* at 429.[58] In addition, the Commission in 1984 eliminated its non-entertainment programming guidelines for commercial television stations. *See Ascertainment and Program Guidelines Order*, 98 FCC 2d 1076.[59] The Commission concluded that these guidelines imposed burdensome compliance costs, infringed on the editorial discretion of broadcasters, and were unnecessary, given marketplace incentives for licensees to offer non-entertainment programming. *Id.* at 1080-90. For similar reasons, the Commission had earlier eliminated the non-entertainment programming guidelines for AM and FM stations.[60]

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[58] The Commission's decision in 1977 that quantitative programming standards were "inherently deficient" and would not improve the comparative renewal process (66 FCC 2d at 428) should be relevant in considering the question raised in the *Notice* (at ¶ 22) as to whether specific minimum public interest requirements would improve the license renewal process. *See also Report and Order* in Docket No. 80-253, 49 RR 2d 740 (1981) (Commission decided that requiring radio and television renewal applicants to submit extensive programming information was unnecessary and unduly burdensome).

[59] These programming guidelines were limited in scope. Essentially, they provided that the full Commission would have to act on any commercial television station renewal application reflecting less than 5% local programming, 5% informational programming (news and public affairs), or 10% total non-entertainment programming. Renewal applicants satisfying these guidelines could have their renewal applications routinely acted upon by staff. These guidelines did not mean that a station offering less non-entertainment programming would be barred from renewal of its license.

[60] *See Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981). Those guidelines had called for AM stations to offer 8% non-entertainment programming and for FM stations to offer 6% non-entertainment programming.

NAB believes that the Commission would have no basis in this proceeding to reverse these long-standing decisions disfavoring numerical public interest standards. The evidence does not suggest that formal numerical quotas are needed because broadcasters are failing to provide non-entertainment programming that serves the public interest. Indeed, the available evidence is clearly to the contrary. For example, a study submitted to the Advisory Committee of the non-entertainment programming by stations affiliated with the four major networks in 17 markets across the country showed that the average amount of non-entertainment programming offered by these stations in each of those markets was more than double the 10% benchmark that the Commission had previously specified. This recent study is entirely consistent with the studies relied upon by the Commission in eliminating the non-entertainment programming guidelines for television stations in 1984.[61] Furthermore, with regard to public service announcements ("PSAs"), which were of particular concern to the Advisory Committee, broadcasters donated $4.6 billion in air time for PSAs in 1996, and approximately 60% of those PSAs were either locally produced or dealt with local issues. *See* NAB Report at 2, 7.[62]

As the available evidence indicates, marketplace incentives are clearly sufficient to insure the provision of very substantial amounts of both non-entertainment programming and PSAs. Numerical program quotas are accordingly unnecessary and reflect an outmoded regulatory

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[61] In reviewing those studies, the Commission concluded that existing marketplace forces, rather than its guidelines, were the "primary determinants" of the levels of non-entertainment programming provided on commercial television. Moreover, the Commission found that these forces had "consistently elicited a level of such programming well above the amounts arbitrarily set by our processing criteria." *Ascertainment and Program Guidelines Order*, 98 FCC 2d at 1085.

[62] Paxson Communications announced this month a donation of one million dollars in air time on its television stations for PSAs concerning Parkinson's disease.

mentality. Given the 85% increase in the number of broadcast stations since 1970[63] and the recent explosion of non-broadcast media including cable, Direct Broadcast Satellite and the Internet, there is no need for each broadcast outlet to "be all things to all people." Thus, even assuming that "there may be individual stations" that do not offer certain types of non-entertainment programming, the Commission has recognized that "such an occurrence" is not "inconsistent with the public interest," since the evidence demonstrates that "on average, stations are performing well above" any expected minimum and that the "overall market performance" will insure the availability of all types of programming on a market basis. *Ascertainment and Program Guidelines Order*, 98 FCC 2d at 1087-88. Since the Commission felt comfortable in eliminating non-entertainment programming guidelines given the marketplace conditions in 1984, NAB believes there is no reason to adopt any similar programming quotas today. Particularly in light of the digital transition, which promises an increase in the number of programming and other service options through multicasting and/or the development of innovative ancillary and supplementary services, a return to the regulatory policies of two decades ago appears wholly unjustified.

Finally, NAB opposes detailed public interest standards with defined numerical quotas as improperly infringing on the editorial discretion of licensees and implicating First Amendment concerns. As the Commission has previously recognized, the government should not "impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served." *Comparative Renewal R&O*, 66 FCC 2d at 428-29. Specific quantitative standards cannot be regarded as "other than an encroachment on the broad discretion" of licensees "to broadcast the programs they believe best serve their

[63] *See Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 29 (1999).

audiences." *Id.* at 427. This "encroachment" is clearly unjustified for DTV broadcasters, given that programming quotas are not needed to insure the provision of substantial amounts of non-entertainment programming and PSAs to viewers.[64]

The adoption of detailed programming quotas would also raise First Amendment concerns, particularly if the Commission were to require licensees to provide set amounts of very specific categories of programming.[65] Requiring broadcasters to provide specific categories of programming would not only interfere with the editorial independence of broadcasters, but would also effectively reduce or eliminate broadcast time for other, less favored program categories. Religious broadcasters, for example, have opposed on First Amendment grounds previous proposals to adopt quantitative programming quotas because they would disfavor the types of programs (such as religious) for which quotas were not set.[66] These First Amendment concerns, as the Commission previously recognized, are only "exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance." *Ascertainment and Program Guidelines Order*, 98 FCC 2d at 1089 (citing cases noting that an increased quantity of programming does not guarantee improved or more responsive service). Because establishing numerical guidelines requiring the provision of defined amounts of non-entertainment

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[64] *See, e.g., Columbia Broadcasting System,* 412 U.S. at 110 ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations").

[65] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) ("FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

[66] *See Comparative Renewal R&O*, 66 FCC 2d at 426. Requiring programming in a variety of defined categories could also cause difficulties with determining whether particular programs broadcast by licensees fit into these categories and therefore satisfied the requirements. NAB doubts whether the Commission should be involved in making such judgments about the programming presented by broadcasters.

programming is unnecessary in light of current competitive market conditions, is unjustified by the available evidence regarding broadcaster performance, and improperly encroaches on the editorial discretion of licensees, the Commission should not consider further the adoption of minimum public interest programming requirements.[67]

G. The Use of Digital Technology to Enhance the Access to Broadcast Programming for Persons with Disabilities Has Been Specifically Addressed in Other Commission Proceedings.

As discussed in the *Notice* (at ¶¶ 24-28), digital technology promises to make video programming more accessible to persons with disabilities. In particular, digital technology may offer viewers more options with regard to changing various features of closed captions (such as font, color and screen position), and may make the provision of video description easier and less costly. Addressing these issues in this proceeding appears largely redundant, however, as proceedings specifically concerning closed captioning and video description have been conducted or are currently pending at the Commission.

With regard to closed captioning, the Commission has already adopted rules requiring television broadcasters to provide very extensive amounts of captioned video programming (both analog and digital) in accordance with a strict schedule.[68] NAB generally sees no need to reopen the decisions made by the Commission with regard to the captioning of analog and digital

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[67] *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (any Commission attempt to establish a "real content-based definition" of the term "diverse programming" "may well give rise to enormous tensions with the First Amendment"); *Office of Communication of the United Church of Christ*, 707 F.2d at 1430-32 (Commission requirement mandating particular program categories could raise serious First Amendment questions); *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (Commission adoption of quantitative programming standards in comparative renewal context "would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission").

[68] *See Report and Order* in MM Docket No. 95-176, 13 FCC Rcd 3272 (1997), *recon. granted in part, Order on Reconsideration*, 13 FCC Rcd 19973 (1998).

programming only two years ago. No suggestion has been made that the Commission's decisions were in error or that video programming distributors are failing in any way to fulfill their obligations under the existing closed captioning rules. Indeed, broadcasters voluntarily captioned large amounts of programming even before the Commission adopted its rules.[69]

More particularly, NAB objects to the suggestion in the *Notice* (at ¶ 25) that broadcasters should be required to provide closed captioning (and/or video description) for public service announcements. In its closed captioning rules, the Commission specifically exempted public service announcements of less than 10 minutes' duration from the closed captioning requirements. 47 C.F.R. § 79.1(d)(6). In doing so, the Commission expressly noted that PSAs are "without an independent source of financial support" and "frequently are created with donated production resources." As a result, "the additional cost of captioning could interfere with the PSA creation and distribution process." *Report and Order,* 13 FCC Rcd 3272 at ¶ 151. Nothing has changed that would warrant the Commission altering its decision with regard to PSAs, whether in the analog or digital environment. Indeed, requiring the closed captioning or video description of PSAs could discourage broadcasters from airing PSAs by, in addition to running the PSAs for free, forcing broadcasters to also pay to caption or describe them. NAB does not believe that the public interest would be served by requirements that would create disincentives for the airing of PSAs by broadcast stations.

NAB also opposes any suggestion that broadcasters should be required to provide closed captioning (or video description) of political advertisements. In its closed captioning rules, the Commission correctly decided that broadcasters should not be required to provide closed

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[69] For example, even prior to the adoption of mandatory closed captioning rules, virtually all prime time programming distributed by six national commercial broadcast networks (ABC, CBS, NBC, Fox, WB and UPN) was closed captioned.

captioning for video programming "that is by law not subject to their editorial control," including "programming involving candidates for public office covered by Sections 315 and 312 of the Communications Act." 47 C.F.R. § 79.1(e)(9). Again, NAB believes the Commission's original determination with respect to political advertisements was correct, and sees no reason to reconsider this recent decision here. Broadcasters have no editorial control over the content of political candidates' advertisements and, indeed, under certain circumstances, are forbidden even from declining to air such advertisements.[70] It would also be burdensome for broadcasters to provide captioning (or description) of political advertisements because campaigns frequently provide their advertisements to broadcasters very shortly before air time. With regard to the proposal that broadcasters expand captioning of public affairs and political programming other than advertisements (*see Notice* at ¶ 25), NAB observes that these categories of programs are not exempt from existing captioning requirements and will therefore be captioned in accordance with the rules set forth for new nonexempt video programming. *See* 47 C.F.R. § 79.1(b).

Moreover, with respect to closed captioning, the Commission has pending a proceeding specifically addressing technical proposals for the display of closed captions on DTV receivers and for the inclusion of closed captioning decoder circuitry in DTV receivers.[71] NAB therefore sees little reason to discuss here the issues specifically addressed in detail in that proceeding. However, given the request for comment on technical issues to ensure the most efficient and

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[70] *See* 47 U.S.C. § 315(a) (broadcast licensee has "no power of censorship over the material broadcast" by candidates for public office). Thus, broadcasters would certainly be prohibited from providing video description of political advertisements, as that would entail adding an entirely new narration to describe the visual elements of the advertisements.

[71] *See Notice of Proposed Rulemaking* in ET Docket No. 99-254, FCC 99-180 (rel. July 15, 1999). Comments and reply comments in this proceeding were filed on October 18 and November 15, 1999, respectively.

inexpensive capabilities for disability access, NAB reemphasizes that, for the digital closed captioning system to function properly, DTV receivers and set-top converter boxes must meet certain technical standards. In particular, digital set-top boxes must be able to pass through, unaltered, all of the analog captioning data contained in DTV programs to the devices (*e.g.*, television sets and VCRs) connected to the analog output of the set-top boxes. DTV receivers must also be able to receive and process the data contained in the Program and System Information Protocol (a data stream containing program captioning and program rating information that is carried in the DTV signal). These technical requirements will ensure that current captioning capabilities available to consumers will not be lost during the transition to digital broadcasting, and that consumers have consistent access to all the caption services (such as foreign language captions) that may be associated with video programming. *See* Comments of NAB in ET Docket No. 99-254 (filed Oct. 18, 1999).

With regard to video description, the Commission has pending a proceeding proposing to require the introduction of video description in the programming of certain broadcasters (specifically, network affiliates in the 25 largest television markets).[72] In the *Notice of Proposed Rulemaking* in that proceeding, the Commission expressly stated that it was not inclined to "adopt a specific timetable to apply to digital broadcasters" with regard to video description, but would address "such specifics in a future proceeding" when it could "craft rules *based upon the experience we have gained as a result of analog broadcasters' implementation of our initial requirements.*" *Id.* at ¶ 22 (emphasis added). The Commission has obviously not yet gained any experience as a result of the implementation of analog video description rules, as the comment

[72] *See Notice of Proposed Rulemaking* in MM Docket No. 99-339, FCC 99-353 (rel. Nov. 18, 1999). Comments and reply comments in this proceeding were due on February 23 and March 24, 2000, respectively.

period in that proceeding ended only last week, and no such rules have been adopted, let alone implemented.[73] Thus, it seems wildly premature for the Commission to consider digital video description requirements in this general public interest proceeding.

However, to the extent that the Commission can take useful action now with regard to digital video description, NAB urges the Commission to focus on promoting the development of digital equipment that will fully accommodate video description. There is no assurance that, even though the ATSC DTV system provides for multiple audio services (as needed for the provision of video description), DTV receiver manufactures will actually implement this feature so that all digital televisions fully support multiple audio channels. Given this uncertainty, the Commission should concentrate its efforts with regard to video description on promoting the manufacture of DTV receivers that will be able to support video description, now and in the future. *See* Comments of NAB in MM Docket No. 99-339 at 21-33 (filed Feb. 23, 2000).

Similarly, NAB believes it is premature to consider rules pertaining to the accessibility of ancillary and supplementary services that DTV broadcasters might offer. At this time, it remains unknown what types of ancillary services will eventually be offered (if, indeed, any are offered). Because the types of ancillary services that could be offered vary widely (*e.g.*, from Internet access to audio signals), any discussion of how to make these services accessible to visual or hearing impaired persons would be more theoretical than real.[74]

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[73] A number of commenters in that proceeding moreover questioned the statutory authority of the Commission to even adopt rules mandating the provision of described programming. *See, e.g.*, Comments of NAB in MM Docket No. 99-339 at 2-10 (filed Feb. 23, 2000).

[74] The Advisory Committee Report specifically suggested that any DTV broadcaster who provides ancillary and supplementary services not impinge on the 9600 baud bandwidth currently set aside for closed captioning. *See Notice* at ¶ 25. NAB sees no problem in this regard, as the ATSC DTV standard, as adopted by reference by the Commission, mandates that the 9600 baud bandwidth always be reserved.

Moreover, NAB wishes to emphasize that it would be pointless to require broadcasters to make ancillary or supplementary services accessible to visual or hearing impaired persons, if DTV receivers on the market are unable to receive and support the information in the DTV signal allowing for such accessibility. As a general matter, the ATSC DTV system is technically extremely complex, and, unlike the much simpler NTSC system, the data needed to support extra services (such as those for the hearing or visually impaired) can be encoded in DTV signals in any number of places and in any number of ways. For any DTV-based services to be fully available to the public, however, DTV receivers must have the capability to receive and decode the relevant information in the DTV signal, as well as the flexibility to allow consumers to easily access the services. Implementing the suggestions of the Advisory Committee with regard to disability access will consequently require cooperation and coordination between broadcasters, broadcast equipment manufacturers, and receiver manufacturers. The Commission therefore cannot simply require broadcasters to provide new DTV-based services for the disabled community (or to consumers generally), without also considering DTV receiver issues. Indeed, to ensure that members of the disabled community have access to all types of DTV programs and services, the Commission will likely be forced to establish DTV receiver specifications, just as the Commission previously required the inclusion of closed captioning decoders in analog television sets.[75]

H. The Promotion of Diversity in Broadcasting Appears Largely Unrelated to Digital Technology.

The *Notice* (at ¶¶ 29-33) discussed at some length the Commission's traditional goal of promoting diversity of ownership, employment and viewpoint in broadcasting. The Commission

[75] NAB has consistently argued that the Commission should act to define receiver standards generally, as part of an effort to encourage the overall DTV transition. *See, e.g.*, Comments of

then specifically asked how it could encourage diversity in broadcasting, consistent with relevant constitutional standards, and sought comment on ways "unique to DTV" that the Commission could use to encourage diversity in the digital era. *Id.* at ¶ 33. NAB is hard pressed to suggest ways "unique to DTV" for promoting diversity of ownership or employment, given the lack of any connection between these aspects of diversity and either digital technology or broadcasters' programming-related public interest obligations.

Digital broadcasting could, however, enhance the diversity of programming formats or content, especially if multicasting proves commercially viable. As discussed in Section II.A., multicasting could increase the number and variety of programming options available to viewers. Multicasting could also allow broadcasters to provide more specialized programming options that appeal to more narrow or specific audiences, such as minorities. In addition, multicasting should increase the need of stations for programming, thereby producing new opportunities for program producers, including members of minority groups or women.[76]

Although multicasting should increase the total number and variety of programming options for viewers, NAB does not believe that the Commission can act effectively to promote program diversity in this regard. It is the marketplace that will determine whether multicasting succeeds or fails, not the Commission.[77] If multicasting ultimately proves to be commercially viable, then an increase in the total number and types of programs offered will follow. In this regard, the Commission need only refrain from taking actions that inhibit the development of

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NAB in CS Docket No. 98-120 at Appendix G (filed Oct. 13, 1998).

[76] Obviously, if a broadcaster offers three, four or five programming streams for even part of the broadcast day, that broadcaster will have an increased need for programming of various types.

[77] As previously described, multicasting might not increase a station's existing audience and therefore might not have additional revenue producing potential.

innovative multicasting services (such as by prematurely imposing expansive public interest obligations on multicasting broadcasters or by denying must carry status to multicast programming). *See* discussion in Section II.A. above.[78]

Moreover, NAB notes that the digital transition will ultimately produce additional opportunities for new DTV stations, in a way unrelated to the public interest obligations of existing broadcasters. In expanding the DTV "core" spectrum to include channels 2-51, the Commission added approximately 175 additional channels, many of them in major markets.[79] These new channels will be licensed through competitive bidding procedures in which the Commission will presumably offer bidding credits or other special measures to new entrants and, if constitutionally permitted, to members of minority groups or women.[80] Thus, in this manner, the digital transition should produce a more competitive broadcasting environment, with new owners and new programming options.

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[78] The Commission must certainly refrain from trying to mandate the provision of certain types of programs by multicasting broadcasters. Any misguided effort to promote diversity of programming by mandating the content of programming will improperly infringe on the editorial discretion of licensees and implicate serious First Amendment concerns. *See Lutheran Church*, 141 F.3d at 354 (in discussing the Commission's interest in fostering "diverse programming," the court stated that any "real content-based definition" of the term "diverse programming" "may well give rise to enormous tensions with the First Amendment").

[79] *See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268, 13 FCC Rcd 7418 at ¶45 (1998).

[80] Under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), any governmental action based on race will be subjected to strict judicial scrutiny. NAB notes that the Commission has for some time been attempting to complete evidentiary studies concerning the barriers encountered by small, minority- and women-owned businesses in the telecommunications markets and the auctions process. It remains to be seen whether these studies, when completed, will provide the type of evidentiary record required to support the adoption of special measures for minorities or women under *Adarand* or *United States v. Virginia, et al.*, 518 U.S. 515 (1996).

Given the constitutional difficulties experienced by some of the Commission's previous efforts to promote diversity in broadcasting,[81] NAB finally notes that the most effective methods to promote diversity in ownership and employment may include voluntary industry efforts or incentive programs requiring congressional action. For example, the broadcast industry has voluntarily created an investment fund, which will provide up to $1 billion in buying power to media businesses owned by minorities and women. Broadcast groups and NAB also administer education and mentoring programs to bring minorities and women into the broadcast business and to help them move ahead in their broadcasting careers. In addition, NAB supports legislation that would give companies tax credits if they sold broadcast properties to minorities or women.[82]

In sum, NAB respectfully disagrees with the supposition that the utilization of digital technology by broadcasters is germane to most efforts to enhance "diversity" in broadcasting. Moreover, attempts to tie broadcasters' program-related public interest obligations to the promotion of diversity will be unavailing in so far as these duties have no connection to the ownership or number of broadcast facilities or to the recruitment of employees for those stations. NAB and the broadcast industry do reiterate their support for voluntary efforts to promote all aspects of diversity in broadcasting and reemphasize their commitment to these efforts in the digital era.[83]

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[81] *See, e.g., Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (preference for women in comparative broadcast licensing proceedings held to violate constitutional equal protection principles).

[82] Such legislation would reinstate in somewhat altered form the Commission's previous tax certificate program, which NAB regards as one of the more effective policies in promoting minority ownership of broadcast outlets.

[83] For example, earlier this year NAB pledged $1.25 million for two new diversity funds. The Gateway Fund will provide a 50% match to help cover the cost of providing training for entry-

I. Efforts to Enhance Political Discourse Are Unrelated to Digital Technology, Appear Unnecessary, and Raise Serious Statutory and First Amendment Concerns.

In its final paragraphs, the *Notice* asked for comment on how "broadcasters' public interest obligations can be refined to promote democracy and better educate the voting public." *Id.* at ¶ 34. The *Notice* (at ¶¶ 35-38) discussed ways that the Commission could promote voluntary efforts by television broadcasters to enhance the political debate, and offered proposals to encourage or require broadcast licensees to provide free air time to candidates.

1. Whether Voluntary or Mandatory, Free Air Time Proposals Have No Connection to Digital Broadcasting, Are Unlikely to be Effective in Improving Political Discourse, and Are Not Needed to Ensure the Broadcast of Campaign Information.

In addressing these various free time and other proposals relating to political discourse, NAB notes that they aim at promoting goals unrelated to digital television or even to broadcasting generally. Rather, these proposals address perceived problems with the current election system and the supposedly pernicious influence of money on politics. NAB objects to this effort to use broadcasters to achieve an end (however worthy such political reform may be) when broadcasters are only tangentially related to the problem being addressed. As even the Advisory Committee recognized, "no reasonable campaign finance reform can focus on television alone, or put the central burden for improving our political system on the backs of broadcasters." Advisory Committee Report at 56.[84]

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level broadcast industry employees, with employers covering the other half of the expenses. The Broadcast Leadership Training Program will provide training for members of groups that are underrepresented in the ranks of broadcast ownership.

[84] *See also* Reed Hundt, FCC Chairman, *The Hard Road Ahead—An Agenda for the FCC in 1997* (Dec. 26, 1996) ("broadcasters should not be required to shoulder the financial burden of political time themselves," but the "[p]rovision of time should be combined with other innovations to make up for the expense to broadcasters").

NAB particularly objects to singling out broadcasters to bear the burden of general political reform when such efforts are unlikely to succeed. If the goal is to truly reform the current election system – with its lack of restrictions on "soft" money and the activities of "independent" campaign committees – then merely increasing the television air time of candidates will be hopelessly inadequate. Without comprehensive campaign finance reform, encouraging or requiring broadcasters to provide more free time to political candidates will have little effect on the conduct of campaigns.[85] NAB additionally believes that the effectiveness of any free time proposals could be impeded by practical difficulties in implementation and administration.[86]

NAB also challenges the assumption underlying the various free air time proposals that "more" automatically means "better." The *Notice* sought comment "on ways that candidate access to television *and thus the quality of political discourse* might be improved." *Id.* at ¶ 34 (emphasis added). But even if broadcasters were required to provide free time – in addition to the considerable amounts of both paid and free air time candidates currently have – the "quality

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[85] For example, even if broadcasters provide additional free time to candidates, this will not reduce the incentives for candidates to raise money to buy even more air time or for a myriad of other purposes. The role of soft money (funds contributed to parties that is used to finance individual campaigns) and political action committees will also remain unchanged. Because the provision of some additional free air time will not lessen the need of candidates to raise as much money as possible, the public perception of the corrupting influence of money and large campaign donors will not be reduced.

[86] Other countries that mandate free time are generally parliamentary democracies. By contrast, the U.S. system has far more political races (*e.g.*, national, state and local), our campaigns last for months instead of a few weeks, and our candidates are under far less party control. These differences raise a number of difficult practical questions regarding implementation of any free time requirement. For example, would a requirement apply to all candidates in all races (federal, state and local) and for all candidates (even "fringe" parties)? If so, would this place an unfair burden on broadcasters, especially those with geographically large markets covering a number of congressional districts and parts of several states (all of which would have separate federal and state races)?

of political discourse" might not improve. Indeed, if a free time requirement resulted in an increase in the amount of air time devoted to various forms of "negative campaigning," then the quality of political discourse could actually decline. As the Commission has recognized in other contexts, quantity does not necessarily guarantee quality.[87]

In any event, NAB questions the assumptions that there is a lack of political coverage in this country, and that simply more coverage is needed (questions of quality aside). For example, broadcasters donated over $148 million in free air time for campaigns and candidate coverage in 1996. *See* NAB Report at 10. Significantly, stations report that many offers of free time are turned down by candidates – as much as $15.1 million worth of air time in 1996, based on the average air time values of events that were actually held. *Id.* The fact that candidates not infrequently decline offers of free time indicates that candidate access to television and radio is adequate.

For the 2000 election cycle, broadcasters have continued to provide substantial amounts of free time for candidates, in addition to news and other coverage of campaigns.[88] Moreover,

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[87] *See, e.g., Comparative Renewal R&O*, 66 FCC 2d at 427 (increasing amount of certain categories of programming "would not necessarily improve the service a station provides its audience"); *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 991 (1981) (the focus of any allegation that a station is doing very little, or nothing, to address through its programming issues facing the community "should not be on the mere amount of programming"; a station with less non-entertainment programming may "be doing a superior job" compared to a station airing more non-entertainment programming, depending on the quality of the programming and the issues addressed).

[88] For example, Hearst-Argyle Television, Inc. has launched "Commitment 2000." This initiative involves Hearst's 24 television stations and its four news radio stations, and will include: targeted web sites; extensive daily campaign reports, debates, forums and town meetings; voter registration announcements; and one-hour per week minimum candidate round tables with local, state and federal candidates hosted by station personnel. E.W. Scripps, as part of its "Democracy 2000" initiative, will make five minutes of free time available to candidates on its nine stations during evening newscasts each of 30 days before local primary and national elections. In response to low voter turnout in recent elections, the New Hampshire Association of Broadcasters is spearheading "Project Vote 2000," a public service campaign of television and

available evidence indicates that voters believe broadcaster campaign coverage is more than sufficient. For example, in a February 1, 2000 poll of New Hampshire voters conducted by Wirthlin Worldwide, 50% of voters felt that local broadcasters provided about the right amount of time covering the state's presidential primary and 37% believed local stations devoted too much time. Only 6% of those polled believed that local broadcasters gave too little time to covering the primary. In another poll conducted by Wirthlin Worldwide, over 85% of polled voters from five states participating in the "Super Tuesday" primaries on March 7, 2000, said that local broadcasters had provided the "right amount" or "too much" coverage of the presidential primaries. Only 7% of voters surveyed said that not enough time was devoted to the campaigns. Perhaps this extensive coverage explains why candidates continue to decline offers of free air time from broadcasters.[89]

Thus, based on available evidence, NAB disputes the *Notice*'s underlying assumptions that political candidates lack access to the nation's airwaves, that there is too little political coverage by broadcasters, and that the public desires more coverage of campaigns and elections. The *Notice* (at ¶ 36) cites figures purporting to show that a number of television broadcasters provide scant coverage of local public affairs and that some stations provide no local news at all. These figures do not, however, demonstrate that local news and public affairs (including political) coverage are not available to viewers on a market basis. NAB sees no cause for alarm if, for example, the sixth-rated television station in a market does not provide local news

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radio spots that urge people to vote. Participating stations intend to donate $1 million in airtime by this September.

[89] For instance, prior to the California presidential primary this year, the California Broadcasters Association offered a 90-minute prime-time live debate to the McCain and Bush campaigns and to the Gore and Bradley campaigns. The offer included free uplinks to all television and radio stations in America that wanted to run the debates. All four candidates declined this offer.

programming, assuming the top five television stations in a market do so, particularly since lower-ranked stations often lack the economic resources to provide significant local news programming.[90] The fact that some individual television stations do not provide extensive local news or public affairs programming does not, however, imply that the public suffers from a lack of political coverage that a "free time" requirement would solve. Viewers are able to obtain campaign and candidate information from a plethora of broadcast outlets, numerous cable channels (*e.g.*, CNN, CSPAN, MSNBC and local access), many newspapers and magazines, and, of course, the Internet.[91] Given this myriad of resources available, NAB respectfully submits that there is no lack of political news and information available for persons who have any interest in obtaining such information. Thus, a voluntary or mandatory requirement for broadcasters to offer additional free time for political candidates is unnecessary.

NAB also wishes to express its reservations about the concept of a "voluntary" free time commitment. Of course NAB supports its members and all broadcasters who have in the past and continue today to provide free time to candidates on a truly voluntary basis. However, if the Commission were to establish any sort of "recommendation" or "guideline" for broadcasters to

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[90] The Commission has specifically recognized that lower-rated television stations with limited financial and other resources often do not have significant local news programming, "given the costs involved." *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 66 (1999).

[91] Indeed, the Internet's role in elections, for both candidates and the public, is steadily growing. *See, e.g.*, Washington Post, at A19 (March 12, 2000) (record turnout reported in Arizona's Democratic presidential primary, which was the first binding election for public office allowing voters to use the Internet to cast ballots from their homes); Los Angeles Times, Part B at 1 (March 6, 2000) (Internet, by offering cheap access to voters, has opened political arena for third parties and alternative candidates, whose numbers have increased); Los Angeles Times, Part A at 20 (Feb. 10, 2000) (Internet now used by campaigns to recruit volunteers, spread candidates' messages, get voters to the polls and to solicit contributions); New York Times, Section A at 19 (March 17, 1999) (Steve Forbes became first presidential candidate to formally announce candidacy on Internet).

provide a certain amount of free air time, then such provision of free air time will no longer be truly voluntary. For example, several public interest groups have filed an informal objection against the pending CBS/Viacom merger. *See* Feb. 2, 2000 Letter from Alliance for Better Campaigns, *et al.* to Chairman Kennard. This letter refers to the "recommendation" by the Advisory Committee that television stations "voluntarily" provide five minutes a night of candidate-centered discourse prior to primary and general elections. However, the letter then charges that CBS has not honored its "commitment" in this regard, and that, as a result, the Commission should find that the CBS/Viacom merger would not serve the public interest.[92] Thus, a mere *recommendation* from the Advisory Committee – one that the Commission has not even adopted – for broadcasters to *voluntarily* provide free air time to candidates has become the basis of an objection filed against a multi-billion dollar merger.

NAB believes that any similar "recommendation" or "guideline" adopted by the Commission would inevitably become a *de facto* requirement because a broadcaster's alleged failure to meet the so-called "voluntary" guideline would come under the Commission's scrutiny during renewals and station transfers and would result in complaints and petitions being filed against the broadcaster. In this way, a "voluntary" standard adopted by the Commission with regard to broadcasters providing free air time would be about as voluntary as the requirement for young men to register with the Selective Service. As a practical matter, moreover, NAB doubts

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[92] Indeed, the letter goes on to say that Commission approval of all applications for broadcast license renewals and station transfers should in the future be conditioned on the record of licensees in providing a minimum amount of air time to candidates.

that the Commission wants to engage in a dispute over the voluntary or involuntary nature of a free air time guideline.[93]

There is, however, one step that the Commission could take to encourage broadcasters to provide the nightly five minutes of "candidate-centered discourse" recommended by the Advisory Committee. Specifically, NAB urges the Commission to rule that these five minute broadcasts qualify as "on-the-spot coverage of bona fide news events" under Section 315 of the Communications Act. Thus, broadcasters who voluntarily provide this time would be exempt from equal opportunity requirements. Such an exemption would allow broadcasters greater flexibility in selecting formats and would permit broadcasters to continue to provide candidate-centered discourse even if one of the candidates in a race declined to participate.

2. Requiring Broadcast Licensees to Provide Free Air Time to Candidates Would Exceed the Commission's Statutory Authority.

The *Notice* (at ¶ 38) asks for comment on the Commission's authority to require broadcasters to provide free air time to political candidates. The Commission cites no specific provisions of the Communications Act that would grant it the authority to impose free political time requirements. NAB presumes that the Commission intends to rely on its general public interest authority.[94] NAB does not believe that this general authority permits the Commission to

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[93] As history has shown, the Commission must be cautious in any attempt to persuade broadcasters to "voluntarily" take particular actions regarding their programming. *See Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C. D. Cal. 1976) (district court found that, *inter alia*, the Commission violated the First Amendment by recommending, through informal influence and pressure, that broadcasters adopt the "family viewing policy"). Although this decision was vacated on procedural grounds on appeal, 609 F.2d 355 (9th Cir. 1979), this case illustrates the dangers inherent in attempting to influence programming by "voluntary" guidelines or standards.

[94] *See, e.g.*, 47 U.S.C. §§ 309(a), 307(c)(1) (Commission shall determine whether grant of applications for new station licenses or for renewal of licenses would serve the "public interest, convenience, and necessity").

adopt rules requiring free political air time because Congress has already set clear rules in the area of political broadcasting that the Commission is not free to change.

NAB agrees that in many areas the Commission enjoys wide discretionary authority, especially in situations where Congress has not expressly spoken and the Commission is writing on a "clean slate." In this case, however, Congress has set forth detailed political broadcasting mandates. Specifically, the Communications Act mandates that, with respect to candidate appearances on broadcast stations, the Commission must require broadcasters to provide candidates with "equal opportunities," must ensure that political messages are not censored, and must require stations to provide "reasonable access" to federal candidates. Most significantly, the Communications Act provides that when candidates buy time, they will be accorded stations' "lowest unit charge" for the same class and amount of time. 47 U.S.C. §§ 312(a)(7); 315(a)-(b).

Congress' inclusion of these specific provisions demonstrates that in the area of political broadcasting (and particularly with regard to the rate charged for political advertising), the Commission lacks the power to impose a different and fundamentally inconsistent regulatory regime. Not only does the lowest unit charge provision plainly signify Congress' contemplation that political advertising time would not be provided for free, the "reasonable access" requirement in Section 312(a)(7) of the Communications Act also specifies that broadcasters can meet their obligations by permitting the "*purchase* of reasonable amounts of time." (emphasis added). Congress, therefore, provided in the Communications Act for a system of political broadcasting based on the purchase by candidates of time at a discount from ordinary rates.

Congress most clearly did *not* establish a regime of political broadcasting based on the provision of free time by broadcasters.[95]

This inclusion by Congress of statutory provisions establishing a system based on the purchase of air time at specified rates implies, under the elementary maxim of *expressio unius est exclusio alterius*, that Congress denied the Commission authority to adopt other, inconsistent rules.[96] Indeed, the "circumstances of this inquiry carry us beyond the rule of *expressio unius est exclusio alterius* . . . and into the domain of inconsistency of purpose."[97] Mandating free air time for political candidates would simply disregard the specific statutory regime adopted by Congress. The Commission's general public interest authority should not, moreover, be

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[95] *See* 47 U.S.C. § 315(b) (setting forth the exact number of days before primaries and general elections during which the "lowest unit charge" applies and the charges that apply to candidates at any other time).

[96] *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (because a federal rule of civil procedure did not include among its enumerated actions any reference to complaints alleging municipal liability, then, under the doctrine of *expressio unius est exclusio alterius*, such complaints are excluded); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (the "ancient maxim" of *expressio unius est exclusio alterius* means that, "'[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode'") (quoting *Botany Worsted Mills v. U.S.*, 278 U.S. 282, 289 (1929)); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (under the statutory construction principle of *expressio unius est exclusio alterius*, the "mention of one thing implies the exclusion of another thing"); *American Methyl Corp. v. EPA*, 749 F.2d 826, 835-36 (D.C. Cir. 1984) (in interpreting authority of EPA under a statutory provision, court relied on *expressio unius est exclusio alterius*, a "maxim frequently invoked by the Supreme Court in construing statutes"); *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9th Cir. 1991) (the doctrine of *expressio unius est exclusio alterius* "as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions").

[97] *Continental Casualty Co. v. U.S.*, 314 U.S. 527, 533 (1942) ("[g]enerally speaking a legislative affirmative description implies denial of the nondescribed powers").

interpreted to authorize the adoption of free air time requirements because such an interpretation would render the statutory provisions in Sections 312(a)(7) and 315 entirely superfluous.[98]

Furthermore, because requiring broadcast stations to provide candidates with free air time implicates serious First Amendment concerns, the Communications Act cannot be construed to include such power, at least absent a clear congressional statement affirmatively authorizing it. The Supreme Court has made clear that it will construe grants of administrative authority narrowly to bar actions in tension with the First Amendment unless the agency's action is plainly *required* by its governing statute. In *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), the Court held: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[99]

In this situation, not only is there no evidence of an affirmative intent of Congress to require free time, the plain language of the Communications Act shows that Congress adopted an entirely different approach to political broadcasting regulation. The Commission, therefore, does

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[98] *See, e.g., Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998) (stating reluctance to adopt a construction of a statute making another statutory provision superfluous).

[99] *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (where an agency's "exercise of its jurisdiction . . . would give rise to serious constitutional questions . . . we must first identify the 'affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction") (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)).

not have the authority to rewrite the Communications Act and impose a free political time requirement contrary to Congress' specification of public policy is this regard.[100]

3. Requiring Broadcast Licensees to Provide Free Air Time to Candidates Would Be Contrary to the First Amendment.

As described in detail above (*see* Section I.G.), the scarcity doctrine has been the factual predicate for upholding the government's imposition of regulations on broadcasters that could not constitutionally be applied to other media. Because the scarcity doctrine can no longer be regarded as logically or empirically sound, the legal rationale for upholding regulations that intrude on the First Amendment rights of broadcasters has lost its traditional moorings. If the deficiencies of the scarcity doctrine have in fact removed the justification for affording broadcasters less than full First Amendment protection, then a free air time requirement would clearly be found unconstitutional. But even if *Red Lion* and its progeny were still regarded as fully applicable for evaluating the constitutionality of broadcast regulations, then NAB believes that a free time requirement would nonetheless be found invalid.

Assuming that, given the logical and empirical shortcomings of the scarcity doctrine, the full level of constitutional protection applies to broadcasters, then any free air time mandate would be subject to strict First Amendment scrutiny and struck down by the courts.[101] For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court held that a state statute, which required newspapers assailing the character of a political candidate to afford free space to the candidate for reply, violated the First Amendment. The Court unequivocally stated that any "compulsion" by the government on newspapers requiring

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[100] *See Chevron*, 467 U.S. at 843 (an agency "must given effect to the unambiguously expressed intent of Congress").

[101] Strict scrutiny requires the government to prove a compelling interest, directly advanced by the least restrictive regulatory means. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997).

them "to publish that which reason tells them should not be published is unconstitutional." *Id.* at 256. The Court also added that, even if a newspaper would incur no additional costs to comply with a compulsory access law and would not be forced to forgo publication of other news by the inclusion of a reply, the state statute failed "to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258. Any free air time requirement would similarly constitute a "compulsion" by the government on broadcasters to air "that which reason tells them should not be" aired, and would intrude into the editorial function of broadcast journalists. Thus, under a strict First Amendment analysis as applied to print media, any requirement forcing broadcasters to provide free air time would be held unconstitutional.

If, however, despite the infirmities of the scarcity doctrine, a reviewing court were to afford lesser scrutiny to a free air mandate imposed on broadcasters, such a requirement would still be found unconstitutional. Even under so-called intermediate scrutiny, the government must still prove that its regulation directly and materially advances a substantial governmental interest by means no more extensive than necessary.[102] Assuming that the government could demonstrate a substantial interest in reforming the current system of elections and campaign finance, a free air time requirement could not be shown to directly and materially advance that interest.

As previously discussed in this section, a free air time mandate would not directly and materially advance the general goal of reforming the current campaign system and ending the perceived pernicious influence of money on politics. Indeed, as explained above, requiring broadcasters to provide free time would have little effect on the conduct of campaigns or on the

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[102] *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-64 (1994).

need of candidates to raise money. There is also no reason to believe that the "quality of political discourse" would be better on air time forcibly appropriated from broadcasters than on air time purchased by candidates or voluntarily donated by broadcasters. Thus, with regard to a free air time requirement, the government will be unable to prove that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting*, 512 U.S. at 664. Certainly a free time requirement will not "advance the asserted state interests [in political reform] sufficiently to justify its abridgement" of broadcasters' First Amendment rights. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986).[103]

Furthermore, a free air time mandate would fail intermediate scrutiny because of its complete lack of tailoring to the government's asserted interest in improving the campaign and election system. Various other means exist for the government to pursue its goal of reforming the election process that do not infringe on the First Amendment rights of broadcasters. For example, Congress could decide to publicly finance election campaigns and condition the acceptance of public funds on an agreement by candidates to abide by specified expenditure limitations. Alternatively, Congress could enact stricter limits on contributions to political campaigns, including additional restrictions on contributions from political action committees and "soft" money.[104] In sum, NAB believes that broadcasters cannot be constitutionally compelled to finance political campaigns, given these other, much more direct means that may be used to advance the government's interest in improving the election process without

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[103] *See also* BeVier, *Is Free TV for Federal Candidates Constitutional?* at 47-49 (AEI 1998) (challenging the assumption by proponents that free time would in fact help solve various perceived ills in the political system) (attached as Appendix A).

[104] The Supreme Court has upheld the constitutionality of limits on campaign contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976).

implicating First Amendment concerns. Merely because placing the burden of campaign reform on broadcasters might be the most politically palatable alternative does not lend it any constitutional respectability.[105]

NAB would also like to point out that, even in the unlikely event that a court would still find *Red Lion* fully applicable today, that case's holding was actually quite limited and would not support the imposition of free time requirements. In fact, *Red Lion* provides that regulations, such as the Fairness Doctrine, are constitutionally permissible only where, in the absence of regulation, certain voices and views would "by necessity, be barred from the airwaves." *Red Lion*, 395 U.S. at 389. The Commission cannot seriously contend that political candidates and their messages are "barred from the airwaves." On the contrary, broadcasters cover political campaigns and candidates in their news broadcasts and voluntarily provide significant amounts of free air time to candidates. As discussed above, federal candidates have a statutory right to "reasonable access" to the airwaves, and, when candidates (federal or state) buy time, they must by statute be accorded special rates. And candidates of course may utilize other media to reach voters and inform the public, including newspapers and magazines, cable and the Internet.[106]

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[105] In fact, free air time mandates might also raise the constitutional problem of forced speech. The Supreme Court has explicitly held that the First Amendment is implicated when the government attempts to compel expression. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (rights protected by First Amendment include "both the right to speak freely and the right to refrain from speaking at all"). Given that the Supreme Court has found that compelling the addition of the author's name to anonymous campaign literature violates the First Amendment, it would seem that compelling broadcasters to provide air time and broadcast facilities to candidates they do not wish to support also raises First Amendment concerns. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

[106] With regard to the Internet, the Supreme Court has explicitly stated that it cannot be considered a scarce expressive commodity, as it "provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, 521 U.S. at 870. Thus, the Internet receives the full level of First Amendment protection applicable to the print media.

Because political candidates and their messages are not in any way "barred from the airwaves," and the public can easily receive political information through an ever-increasing variety of media, *Red Lion* cannot properly be regarded as providing a justification for regulations (such as free air time requirements) intruding on the editorial discretion and First Amendment rights of broadcasters. *See id.* at 389-90.

Indeed, NAB also wishes to emphasize that the Supreme Court (even in cases affording broadcasters a lesser degree of constitutional protection due to the presumed scarcity of spectrum) has overturned regulatory schemes that tread unnecessarily on the editorial discretion of broadcasters.[107] The Supreme Court's upholding of Section 312(a)(7) of the Communications Act concerning access of federal candidates to broadcasting facilities does not, moreover, imply that a free time mandate would be similarly approved. The Court's opinion in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), relied heavily on the *Red Lion* scarcity doctrine which, as shown above, is subject to increasing doubt as authority for any content regulation. In addition, the Court stressed the discretion that licensees retained under the "reasonable access" provision, and it upheld Section 312(a)(7) against a First Amendment challenge only because it found that "the *statutory* right of access" had "properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters." *Id.* at 397 (emphasis added).[108]

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[107] *See, e.g., League of Women Voters*, 468 U.S. at 378 (statute forbidding noncommercial educational broadcast stations that receive grants from the Corporation for Public Broadcasting from engaging in editorializing was found unconstitutional, as it unjustifiably abridged important journalistic freedoms); *Columbia Broadcasting System*, 412 U.S. at 110-126 (Court affirmed Commission's refusal to require broadcast licensees to accept all paid editorial advertisements, as such requirement would intrude unnecessarily on editorial discretion of broadcasters and risk an enlargement of government control over broadcast content).

[108] A reviewing court might well take a less favorable view of the Commission, without explicit statutory direction from Congress, attempting to go further and instituting a free air time proposal.

CBS v. FCC further involved *paid* time and access rights that were limited both in terms of the number of candidates and by the limitation to access that was "reasonable" in light of the needs of candidates *and* broadcasters. *Id.* at 396 (emphasizing that Section 312(a)(7) created a *limited* right to "reasonable" access). Free time proposals would radically alter that balance. Rather than having to choose candidate paid spots over commercial paid spots, broadcasters would be forced to subsidize political campaigns. Particularly for stations whose service areas may include several states, the amount of free time that candidates could demand might be far greater than now required under the reasonable access provision. This case therefore provides little support for assuming that a *Commission* rule (especially as opposed to a congressional statute) requiring free time would be upheld.

Finally, NAB wants to address briefly other theories that might be advanced to justify a free time mandate. First, it may be asserted that broadcasters' acceptance of governmental regulation (even of content) is a fair exchange (or *quid pro quo*) for their ability to use the airwaves. The Commission has previously explicitly rejected this argument, "[t]o the extent . . . that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis." *Syracuse Peace Council*, 2 FCC Rcd at 5055. As the Commission explained, "[i]t is well established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right."[109] Thus, even assuming that broadcasters have in fact received a "public benefit" by the temporary loan of an additional six MHz of spectrum for the digital transition (which, as explained in Section I.D. above, is

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[109] *Syracuse Peace Council*, 2 FCC Rcd at 5055, 5068 (citing *Perry v. Sinderman*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

doubtful), the receipt of this loaned spectrum in no way justifies the relinquishment of their First Amendment rights.[110]

It may also be contended that broadcasters have limited First Amendment protections that would not be infringed by a free time mandate because they have few "rights" with regard to licensed spectrum, which is "owned" by the "public." From this supposed "public ownership" of spectrum, proponents of broadcast regulation attempt to imply that the government, like any other property owner, is essentially unconstrained by the constitution in its control over the spectrum. As explained in detail in the monograph attached as Appendix A, this public ownership assertion is practically and legally "hollow." BeVier, *Free TV* at 3. Indeed, this ownership assertion is "no more persuasive, factually, than would be an argument that because newspaper newsracks are almost always on public property -- and are as essential to newspaper distribution as is spectrum to the broadcasters – the newspapers thereby give up editorial control to some form of government regulation."[111] But even assuming that broadcast spectrum could or should be regarded as "public domain," the Supreme Court has specifically held that this fact does "not resolve the sensitive constitutional issues inherent in deciding whether a particular

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[110] *See* Smolla, *Free Airtime for Candidates and the First Amendment* at 1-4 (The Media Institute 1998) (attached as Appendix B), for a further discussion of unconstitutional conditions.

[111] DeVore, *The Unconstitutionality of Federally Mandated "Free Air Time"* at 3 n.5 (presented at Advisory Committee meeting on March 2, 1998) (attached as Appendix C). *See also* Robinson, *Electronic First Amendment* at 911-12 ("The reference to public ownership of the spectrum is a common locution, but it has generally been used as simply another way of articulating the scarcity argument – the notion being that because the frequencies were scarce, their use had to be licensed and the licensing power was tantamount to public ownership of public property. As a mere trope for regulatory power, the reference to 'public property' is innocuous; but if it is allowed to float off by itself as an independent ground of regulation, it becomes a mischievous confusion."); *Time Warner Entertainment*, 105 F.3d at 727 (Williams, J., dissenting from denial of rehearing *en banc*) ("There is, perhaps, good reason for the [Supreme] Court to have hesitated to give great weight to the government's property interest in the spectrum.").

licensee action is subject to First Amendment restraints." *Columbia Broadcasting System*, 412 U.S. at 115. Accordingly, the mere claim that the public "owns" broadcast spectrum clearly cannot be regarded as stripping broadcasters of their First Amendment rights or otherwise justifying the imposition of content regulations on broadcasters.[112]

In evaluating the First Amendment standards that should be applied to the broadcast media, NAB agrees with the Commission's earlier conclusion that such evaluation

> should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.

Syracuse Peace Council, 2 FCC Rcd at 5055. The Supreme Court has similarly emphasized the "crucial societal role" of news broadcasters and publishers, in a case addressing an exemption for media corporations from a generally applicable regime of political campaign reform.[113] Given the similar functions of all media in a democratic political system, and the deficiencies of the scarcity doctrine traditionally utilized to justify lesser constitutional protections for only the electronic media, NAB believes that a free air time requirement should be regarded as a violation of broadcasters' First Amendment rights.

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[112] Even in a case involving a *state-owned* public television station, the Supreme Court has held that a broadcaster has the journalistic discretion to exclude an independent political candidate from a candidate debate. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

[113] In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990), the Supreme Court examined a Michigan law restricting the use of corporate funds for expenditures in support of or in opposition to candidates in elections for state office. Media corporations were specifically exempted from this law. The Supreme Court not only determined that this exemption was allowable, but appeared to indicate that the law would not have been upheld had it been applied to the media. This case stressed the "unique societal role" of the press, explaining that the media

III. CONCLUSION

After carefully examining the array of new or expanded public interest duties suggested in the *Notice* for DTV broadcasters, NAB concludes that these additional obligations are generally not justified, for two primary reasons. First, nothing inherent in digital technology requires a different or more expansive public interest analysis than that currently applied to analog television broadcasters. Second, digital television will not benefit broadcasters to such a greater extent than their analog channels that some additional recompense in the form of increased public interest duties should be imposed. Moreover, while many of the specific goals identified in the *Notice*, such as encouraging diversity or promoting democracy (*see id.* at ¶¶ 33-34) might be worthy, they are essentially unrelated to digital broadcasting. Expanding the public interest obligations of DTV broadcasters will therefore not materially advance those goals, particularly in a cost effective manner.[114] NAB also contends that the formulation of appropriately tailored and cost effective public interest requirements is unlikely to be accomplished during the current, preliminary stage of the digital transition.

In addition, many of the proposals in the *Notice* appear contrary to the Commission's evolving interpretation of the public interest standard, which shows a clear pattern of decreasing regulation as the number of information sources increases. For example, following the vast increase in the number of radio and television stations in the 1960's and 1970's, the Commission in the 1980's eliminated much of its detailed broadcasting rules (such as ascertainment and

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"serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials."

[114] "[I]t is not sufficient for a regulation to articulate desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates; furthermore, if the goals could be achieved in a less costly manner, then the latter should be the approach selected." T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 309 (1994).

numerical guidelines for non-entertainment programming). Given the explosion of non-broadcast media in recent years (including various multichannel video programming providers and the Internet), NAB posits that there is less need than ever for the Commission to increase its regulation of the media marketplace. In particular, the transition to digital broadcasting – with its potential for increasing programming and other service options – would appear to justify a further decrease in Commission regulation, rather than new and intrusive public interest requirements. In sum, in an era of digital abundance, NAB believes that the Commission should rely to a greater extent on the discretion of broadcasters and the increasingly competitive media marketplace to insure service to the public.

Finally, NAB reemphasizes that convergence in telecommunications technology has made regulatory distinctions between various media less precise, thereby undermining the rationale for the continued distinct treatment of broadcasting. Given the lessening distinctions between various types of media and the increasing competition between traditionally distinct service providers, the Commission should refrain from imposing expansive new public interest requirements on DTV broadcasters that are not applicable to other service providers against whom broadcasters will be competing, now and in the future. Not only should the Commission refrain from subjecting broadcasters to unequal and burdensome public interest obligations as a matter of policy, but NAB reminds the Commission that the constitutional basis for expanding content-related public interest obligations is uncertain at best. Thus, based on the policy and legal grounds discussed in detail in these comments, DTV broadcasters should be accorded the

discretion to develop and offer innovative programming and other services they believe will best meet the needs of the communities they serve.

Respectfully submitted,

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APPENDICES

APPENDIX A

Is Free TV for Federal Candidates Constitutional?

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Is Free TV for Federal Candidates Constitutional?

Lillian R. BeVier

IN THE MONTHS following the 1996 election campaign, calls for "reform" have filled the air. A spate of ambitious new schemes to regulate campaign finance practices have been advanced. Those schemes often include a provision that would require broadcasters to provide free TV time to candidates for federal office. Proponents of free TV bemoan the high cost of political campaigns in general, and of television advertising in particular. They express dismay about negative campaigning; they worry about citizens' losing confidence in the political process and in elected officials; they think that the electorate is hungry for straightforward information and that this hunger can be satisfied by giving candidates opportunities to appear on television in prime time.

This monograph offers a critique of the free TV proposals. It discusses their constitutionality and their wisdom as policy. The proposals have come in a variety of regulatory packages, all of which are based on a common rationale and pursue common strategies. Thus, the analysis that follows focuses on the following generic conceptual outline of the free TV proposals:

- Broadcasters must donate a certain number of prime-time hours to be used by candidates for federal office during each election cycle.

- Candidates accepting the free time must agree to certain conditions with regard to their use of the time: they

must, for example, appear *in person*; or they must directly face the camera; or they must appear for a specified amount of time; or they must agree to limit their own campaign spending or raise money for their campaigns from particular kinds of citizens.

Thus, the essence of free TV proposals consists of two features: broadcasters provide time without being compensated, and the candidates who use it conform their use of it to a prescribed format.

Assessing the constitutionality of proposals with features such as those is far from a straightforward task of doctrinal analysis. Assessing their wisdom as a policy matter is also somewhat an exercise in speculation about imponderables. For, despite having superficial similarities to measures that have been on the books for years,[1] the free TV proposals embody a strategy that differs in kind from anything that has been tried before. A brief road map will help the reader chart a course through the analysis that follows.

As far as the Constitution is concerned, the free TV proposals do not fit perfectly into a single doctrinal category. It is not even obvious whether the First or the Fifth Amendment presents the greater challenge to the proposals' supporters. And with regard to the First Amendment, no one rule provides a complete answer, nor does one methodology chart the obviously correct analytical path. Thus, the constitutional analysis will have something of a two-steps-

1. For example, section 315 of the Communications Act of 1934 provides that broadcasters must provide candidates equal opportunities to gain airtime. And section 312(a)(7), held constitutional in CBS *v.* FCC, 453 U.S. 367 (1983), grants candidates the right to purchase airtime at the broadcaster's lowest unit charge. For a brief discussion of the history of political broadcast regulation, *see* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 66-69 (MIT Press & AEI Press 1994).

forward-one-step-back quality. It will assess the proposals in terms of the several apparently relevant doctrinal categories, noting the aspects of free TV's fundamental regulatory strategy that render so many of the precedents an imperfect fit.

This monograph begins by asking, "Whose Property Is This?" Proponents of broadcast content regulation in general, and of the free TV proposals in particular, gain considerable rhetorical momentum from the explicit claim that "the public" owns the broadcast spectrum. From public ownership, they imply, follows the conclusion that the government's regulatory hand is for all practical purposes free from constitutional constraints: the government as owner is as free as any other owner would be to decide how to use "its" property. First, I critically examine the public ownership assertion, finding it conceptually hollow. Then I evaluate the broadcasters' competing claim that broadcast licensees have the functional equivalent of property rights in their licenses and that the free TV mandates accordingly should be held to be the constitutional equivalent of a taking of those rights for public use, for which compensation should be paid.

Next, I consider the First Amendment issues that are implicated in free TV's attempt to control "Political Speech and the Television Set." The analysis critically examines the current constitutional regime, which entails a different set of First Amendment constraints on the regulation of the broadcast media from those that obtain for the rest of the population, including the print media. In addition, the analysis evaluates the free TV proposals in terms of the precedents conventionally thought to be relevant in the particular context of broadcast regulation. I then analyze the proposals on the assumption that broadcast regulation does not represent a unique First Amendment context. I assume that the First Amendment rights of broadcasters are the same as those of other citizens, and I evaluate free

TV's conformity with the main body of First Amendment jurisprudence.

The monograph then briefly summarizes several prominent free TV proposals. I assess their constitutionality and evaluate their policy agenda. I conclude by expressing the judgment that the proposals are constitutionally problematic, that they would pursue illegitimate aims, that they would in any event be ineffectual, and, most important, that their adoption would run counter to deeply embedded American values.

Whose Property Is This?

An Empty Theme and Its Variations. Broadcast regulator wannabes have found the metaphor of public ownership of the airwaves[2] fertile ground for their claims to regulatory legitimacy. The metaphor of public ownership has yielded a number of variations, each of which comes with its own more or less promising doctrinal apparatus. The "public trust" variation embodies the idea that the *public* is the beneficial owner for whom the licensee acts as *trustee* of the spectrum rights. In the specific First Amendment context, which I shall subsequently consider, there is the "public forum" variation, which embodies the notion that the public remains the owner of the "property" that the broadcast license represents. Finally, there is the "license as conditional grant" theory, which embodies the notion that the government as owner may condition the transfer of "its" property on the grantee's agreement to fulfill certain government-imposed obligations. None of those theories provides convincing support for the regulators' claims. Each nevertheless has sufficient superficial plausibility to warrant examination here.

In evaluating the theories, it is important to keep in

2. 47 U.S.C. § 301 (1982).

mind that regulators, politicians, broadcasters, and scholars have become accustomed to the existence of a broadcast content regulatory regime in principle. Two of the most astute and skeptical commentators on the regime have even suggested that "[i]t is too late to argue that the government's claim to own the airwaves is invalid."[3] Accordingly, a skeptic of the regime confronts an exceedingly low threshold of plausibility with respect to arguments proffered in its defense. The regulators' arguments, especially those grounded on public ownership, are like clouds. From a distance they seem solid and impenetrable. Up close they turn out to be no more substantial than dense fog, vaporous yet still capable of hopelessly obscuring one's vision.

Also note that the metaphor of public ownership serves regulators on more fronts than the strictly analytical. In the first place, it serves the significant rhetorical function of suppressing knowledge of what is really going on and changing the nature and content of the debate. As Professor Glen O. Robinson has aptly put it,

> the public ownership claim here is a trope, a way of reifying the government's claim to regulatory authority. The spectrum itself is simply a phenomenon produced by the transmission of electromagnetic energy through space. . . . [T]o say that [the government] owns the "airwaves" is merely to give a property label to its regulatory powers. . . . In common discourse the assertion of ownership is the assertion of a power that demands no further explanation. When it is said that the government (or the individual) can do something with its property because it *owns* it, it is said by way of ending a conversation about the source of power and the reasons for acting.[4]

3. KRATTENMAKER & POWE, *supra* note 1, at 227.

4. Glen O. Robinson, *Spectrum Property Law 101*, 41 J.L. & ECON.

In the second place, the public ownership metaphor serves to derail, before they leave the station, the broadcasters' claims that the free TV proposals would amount to a taking of "their" property for which they would be entitled to compensation.[5] The broadcasters' takings claim, constitutionally independent of any First Amendment arguments, is not grounded on the assertion of a right to be editorially free from government *regulation* of content. Rather, the takings claim rests on the assertion that the free TV requirement would constitute a coerced and uncompensated *transfer* from the broadcasters to the candidates of a valuable property right. Thus if the free TV proponents can successfully argue that the broadcasters do not in fact "own" the rights conferred on them by their licenses, they can secure a substantial footing in their effort to discredit the broadcasters' takings claim.

All this having been said, however, it is worthwhile pointing out that the claim of public ownership has been credibly claimed to have been based from its very inception in the Radio Act of 1927 on a deeply misleading picture of the need for regulation. Thomas W. Hazlett, the economist, has argued that in the mid-1920s government officials made and executed a conscious decision to prevent the emergence of a market for broadcast spectrum rights.[6] They desired chaos, and chaos ensued. Congress responded by enacting

(forthcoming Oct. 1998) (emphasis in original).

5. *See, e.g., Spectrum Management Policy: Hearings Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 1st Sess. 46 (1997) (testimony of FCC Chairman Reed E. Hundt) ("[T]he spectrum belongs to the people. Those who characterize public-interest obligations as encroachments on licensees' rights ignore the fact that licensees use precious public property for their own private gain.") [hereinafter *Spectrum Management Policy*].

6. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

the comprehensive regulatory scheme embodied in the 1927 act. If the story Hazlett recounts is correct, notes J. Gregory Sidak, "then Congress in 1927 enacted the most intrusive regulatory controls to that time imposed on the use of spectrum—not in response to genuine market failure, but in response to conscious efforts by the federal government to prevent a market from functioning."[7] The claim of public ownership in the 1927 act was made in the face of longstanding prior use of the spectrum by "homesteaders," some of whom challenged the act as a taking. Although their particular claims lost,[8] the implications of the government's assertion of ownership are on reflection too far-reaching to regard the assertion as anything other than an exercise of political muscle. Contemplate, for example, the outcry that would occur if Congress were to decide that it owns *the air* and proceeded to demand that all communication traveling through the air conform to government regulations.[9]

Public Trustee. In *Red Lion Broadcasting Co., Inc.* v. *FCC*,[10] the Court found significant conceptual support for limiting broadcasters' First Amendment rights in the idea that broadcasters are not the beneficial owners of the rights that their licenses confer upon them. Instead, the public is the beneficial owner: "It is the right of the viewers and listeners, not the right of the broadcasters, which is

7. J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 60 (University of Chicago Press 1997).

8. White v. Johnson, 282 U.S. 367 (1931); Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); City of New York v. FRC, 36 F.2d 115 (1929), *cert. denied*, 281 U.S. 729 (1930); United States v. Gregg, 5 F. Supp. 848 (S.D. Tex. 1934).

9. *Cf.* SIDAK, *supra* note 7, at 309.

10. 395 U.S. 367 (1969).

paramount."[11] The broadcasters, on that theory, are merely trustees who owe a duty to implement this "right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences."[12]

The trust imagery packs considerable rhetorical punch. Note, for example, one of its early invocations, in which then D.C. Circuit Judge Warren Burger used it to prop up his court's holding that conferred standing on citizens in Federal Communications Commission proceedings:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.[13]

Advocates of free TV for candidates deploy the public trustee concept to their great rhetorical advantage. In view of the fact that broadcast licenses are extremely valuable and in the past broadcasters have received them at a price of zero, one can perhaps understand the intuitive appeal of the claim that they should be burdened with "enforceable public obligations," somewhat analogous to those owed by a private trustee to the beneficiaries.[14]

11. *Red Lion*, 395 U.S. at 390.

12. *Id.*

13. Office of Communication of the United Church of Christ *v.* FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

14. Many commentators, politicians, and supporters of free TV have made explicit a supposed connection between the claim that broadcasters have an obligation to provide free TV time to candidates and broadcasters' receipt in April 1997 of a second channel for development of digital television. *See, e.g.*, Leslie Wayne, *Broadcast Lobby Excels at the Washington Power Game*, N.Y. TIMES, May 5, 1997, at D1.

The public trustee concept has superficial plausibility because it draws on a well-developed and relatively familiar body of law that seems precisely designed to provide a cloak of justification for the regulators' plans. The law of trusts permits legal and beneficial ownership to be separated, subjects the legal owner (the trustee) to a fiduciary duty to act solely in the beneficiaries' interest, and penalizes the trustee both for acts that fail to maximize the beneficiaries' interests and for those that feather his own nest. The fiduciary notion appears, as Thomas G. Krattenmaker and Lucas A. Powe, Jr., suggest, to

> fit broadcasting like a glove. Broadcasters were granted a wonderful corpus: "the free and exclusive use of a limited and valuable part of the public domain." The beneficiaries of the trust were the viewers and listeners. They were owed duties. Those would include compliance with applicable laws, but could include more. The broadcaster-trustee was, after all, a fiduciary and therefore was bound to act in the interests of the beneficiaries, even if there were no applicable rules on a specific subject.[15]

On more searching examination, the public trustee concept's plausibility turns out to be illusory, its intuitive appeal unearned. Principally, that is so because the power of the analogy to persuade depends on similarities between broadcasters and private trustees that do not in fact obtain. In the first place, instead of a corpus of property to which a trustee's duty might attach, there is only a metaphor of spectrum ownership. That objection might seem overly formalistic or beside the point: a broadcast license does after

15. KRATTENMAKER & POWE, *supra* note 1, at 164 (footnote omitted).

all embody a "bundle of rights" and thus has as much claim to be conceived of as a trust corpus as would any intangible property.[16] In the second place, though, the fiduciary duties by which the acts of private trustees are governed are highly elaborated and, while perhaps somewhat indeterminate at the margins, quite clearly specified. There is, moreover, little room for argument about the nature and source of the trustee's duties, about their enforceability, or about who has standing to object to their breach. Attempts to specify—to give concrete meaning to—the nature of broadcasters' fiduciary obligations, by contrast, have been almost completely unsuccessful. The Supreme Court has come up with criteria no more specific than those loosely embodied in the twin assertions that the broadcaster has "obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves"[17] and that the broadcaster's obligations are the correlatives of "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences"[18]—whatever *that* might be in concrete application!

The fact is that, as with the claim of public ownership, the "public trustee" analogy is merely "a trope, a way of reifying [and rhetorically legitimizing] the government's claim to regulatory authority."[19] It was first deployed as a justificatory image at a time when the idea of content regulation "in the public interest" was losing credibility.[20] Though the trustee image has been used sporadically to

16. The argument in text, of course, cuts both ways: if licenses are, correctly, understood to convey "bundles of rights," they are the conceptual and functional equivalent of "property" that the free TV mandates would "take" without compensation.

17. *Red Lion*, 395 U.S. at 389.

18. *Id.* at 390.

19. Robinson, *supra* note 4.

20. KRATTENMAKER & POWE, *supra* note 1, at 144–74.

rationalize particular regulatory initiatives, no attempt has ever been made rigorously or systematically to give it legal substance or form. Now that the idea of regulation "in the public interest" seems to have regained favor at least in some quarters,[21] the public trustee image may well become merely a makeweight. Substantive legal relationships will not be affected even if it is dropped altogether from the repertoire of regulatory justifications, however. The trustee image never had anything other than rhetorical force anyway, and it certainly never did any real legal work.

License as a Conditional Grant of Government Property. Former FCC chairman Reed E. Hundt once asserted, "Broadcasters are given a license to use public property, and it can be conditioned in exactly the same way that an apartment lease can be conditioned to say 'no pets.'"[22] He seemed to be suggesting that because the government "owns the spectrum," it can license the spectrum on any terms it chooses, regardless of whether the licensees would be signing away constitutional rights by agreeing to the government's terms. That straightforward formulation of a rationale for government-imposed controls on broadcasting content is not the conversation-stopper that Mr. Hundt seemed to think it. It relies once again on the trope of public ownership. But the "conditional grant"

21. *Id.* at 174; *see also Spectrum Management Policy*, *supra* note 5, at 46. ("The FCC has always had the duty to grant and renew broadcast licenses only after determining that the public interest will be served.") (testimony of Reed E. Hundt, former chairman of the FCC).

22. *Quoted in* Paul Taylor, *Fat Cat Broadcasters Should Help Clean Up Politics*, MAINICHI DAILY NEWS, May 23, 1997, at 2 [hereinafter *Fat Cat Broadcasters*]. Mr. Hundt was also quoted as saying, with respect to the free TV proposals: "This is a nonproblematic issue legally. I don't want to say it's trivial, but it's very close to trivial as a constitutional matter. Airwaves are not private property, and no license has ever been treated as a private matter." Amy Keller, *FCC Gets Ready To Force Free TV Issue*, ROLL CALL, Apr. 17, 1997, at 1.

incarnation of the trope brings into play one of the Court's most incoherent doctrines, namely the "unconstitutional conditions" doctrine.[23] Mr. Hundt's assertion begs the broad question of when, how, under what circumstances, and with regard to securing what public objectives the government may, by bargaining with its citizens with respect to government-controlled resources, achieve regulatory purposes that would otherwise be constitutionally unobtainable. Mr. Hundt wants us to infer that the answer to that question is "anytime the government wants, and to achieve any goals it deems worthy," and thus, if the government chooses to mandate free TV as a condition of licensing "its" spectrum, it may certainly do so.

But it is not nearly so easy to resolve the matter in the government's favor. That the government has regulatory power over the spectrum sufficient to legitimize its definition and allocation of use rights has long been settled. That the government has considerable discretion to determine how the use rights should be defined and allocated is also not a proposition in doubt. Nor is there any real question that the government may choose either to give those rights away or to sell them. But those facts tell us nothing about the question in which we are currently interested—which is the question Mr. Hundt's assertion begs—namely, whether the Court would or should hold that the government's

23. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (unconstitutional conditions doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1101-05 (1995) (arguing that, given the diversity of contexts in which courts have invoked it, no single rationale can explain the doctrine); *see also* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

regulatory power includes the power to require broadcasters to provide free TV time to candidates for federal office.

The point of the preceding analysis is that a persuasively affirmative answer to that question does not lie in any variation of the government ownership theme. A more satisfying approach to an answer will require the analyst to specify and scrupulously to evaluate both the broadcasters' claims of freedom from such regulation and the government's claim that free TV for candidates would use a minimum of coercion to implement a genuinely worthy goal. That task is more relevant to First than to Fifth Amendment analysis, and accordingly I shall take it up in connection with the First Amendment discussion.

Who Should Be Paying for This? The "free TV for candidates" rhetoric obscures a central fact: "free TV" is decidedly *not* "TV without cost." To be sure, the proposals to have broadcasters provide TV to candidates would transfer rights without charge, but making the rights "free" to candidates would not make the cost of providing them disappear. It would simply shift that cost from the candidates to the broadcasters, who would suffer an immediate revenue loss that would be reflected in significantly decreased license value. The broadcasters argue that they ought not to be forced to bear the full cost of providing the supposed public benefits that "free TV" would bring. In constitutional terms, they argue that requiring them to provide free TV to political candidates would amount to a taking of their property without compensation.

The Fifth Amendment to the Constitution provides "nor shall private property be taken for public use without just compensation being paid." When improvement of the public condition requires that certain privately held assets be used in particular ways, the amendment requires that the government buy or lease the assets (the "private property") and pay compensation to the former owners. Often, howev-

er, the government attempts a kind of end run around the compensation requirement. It attempts to achieve its goal, as in the free TV proposals, not by buying and paying for the use it desires but by regulating or mandating it into (or out of) existence. Often, too, as the free TV mandates would surely do, the regulations imposed for the supposed public welfare substantially reduce the value of the regulated property. When that happens, the private owners claim—as the broadcasters do with respect to the free TV proposals—that the regulations amount to "takings" and that they, the property owners, ought to receive compensation for the diminution in their property's value.

The jurisprudence that the Court has developed in considering those claims is a paradigm of doctrinal unintelligibility. A regulation that "goes too far" is a taking,[24] but the Court has without apology eschewed the effort to articulate with anything like useful specificity the criteria by which it will decide whether a regulation has gone "too far."[25] With respect to the broadcasters' takings claim, however, the free TV proposals may not at first blush appear to present an issue of a regulation "gone too far." That is so because the rhetoric of broadcast regulation has been so insistently (if incoherently) premised on the claim that broadcasters do not really "own" their licenses. Once one acknowledges that broadcasters own—or perhaps it is enough to acknowledge that they have the functional equivalent of property rights in—their licenses, the free TV mandates could not be implemented unless the broadcasters were compensated, since the mandates obviously amount to a coercive transfer, a "taking," of broadcasters' rights.

24. Pennsylvania Coal Co. *v.* Mahon, 260 U.S. 393 (1922).

25. Penn Central Transp. Co. *v.* City of New York, 438 U.S. 104, 124 (1978) (The "Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.").

Thus, resolution of the broadcasters' takings claim does not appear to require the delicate and complex doctrinal maneuverings involved in determining whether the free TV mandates "go too far." Instead, it requires direct confrontation with the government's assertion that *it* owns the spectrum. As we have seen, the public ownership of the spectrum metaphor provides effective political cover for the assertion of regulatory authority of a scope that the government might otherwise find difficult to justify. In the foregoing discussion of the Fifth Amendment issues raised by free TV, this monograph has argued that the government's assertion of spectrum ownership rests on a foundation both dubious and elusive. Considerable conceptual purchase exists for the argument that, despite the public ownership rhetoric, the broadcasters are owners. Several further points bear on the takings question.

No Finessing the Ownership Issue Where a "Taking" Is the Claim. First, a general point: As I will describe in the discussion of First Amendment issues, the Court has in the past deployed something very like the government ownership of the spectrum argument to justify reducing the level of scrutiny of broadcast regulations. But even if the Court continues to embrace spectrum ownership for First Amendment purposes, it might well be persuaded to take a more realistic view of free TV for purposes of *Fifth Amendment* analysis. That is so because, in principle, the First and Fifth Amendments perform different functions and are designed to guard against different kinds of government overreaching. The Court can vindicate First Amendment principles without tackling the public ownership metaphor head-on, but not so Fifth Amendment principles.

The First Amendment's most important function is to guard against government attempts to control the content of political debate. It appears to be the case that many people do not believe that the kind of control that the FCC has

over the years exercised over broadcast content presents a systematically worrisome threat to political freedom. That is so despite the fact that the electronic media are regulated in ways that would be appropriately unthinkable if the print media were involved. Reasons that do not now seem particularly persuasive provided the initial rationale for that system of regulation. The Court has not been eager to dismantle the metaphor of "public ownership of a scarce resource" that supports the regulatory regime. When First Amendment challenges are mounted, though, as we shall see, the Court need not straightforwardly abandon the public ownership metaphor to engage on occasion in heightened scrutiny of regulators' efforts[26] and thus give life to First Amendment principles.

The Fifth Amendment, on the other hand, is designed to prevent unfair and unjust coercive wealth transfers disguised as regulation. The only way that the Court can accomplish that purpose is to hold that a regulation is a taking for which compensation must be paid. Thus, if a significant defect of the free TV mandates is that they coercively transfer wealth from broadcasters to political candidates, then Fifth Amendment principles would be at stake. There would be no way to vindicate them, however, without holding that the broadcasters' *property* had been taken; and there would be no way to reach that conclusion without directly confronting and dispatching the public ownership claim—if not in its entirety, then at least in part.

"The Bitter with the Sweet" Will Not Do. A second general point is that the broadcasters' takings claim gets some support from a line of cases defining *property* in a different Fifth Amendment context. I refer to the line of cases recognizing statutorily created entitlements as "property" for purposes of Fifth Amendment procedural due

26. *See, e.g,* FCC *v.* League of Women Voters, 468 U.S. 364 (1984).

process. At one time, the Supreme Court held that individuals who received public benefits, such as public employment or welfare, had no right to procedural protections on termination of their claims.[27] In *Goldberg* v. *Kelly,*[28] the Court reversed that doctrine and held that a welfare recipient's interest in continued receipt of welfare benefits was a "statutory entitlement" amounting to "property" within the Due Process Clause, and thus that it could not be terminated without a hearing.

With respect to public employees, the Court flirted with a doctrine that permitted states to evade *Goldberg* by statutorily limiting the procedures to be employed in determining whether their employment should be terminated:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.[29]

The Court ended this flirtation in *Cleveland Board of Education* v. *Loudermill,*[30] when it unequivocally held:

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of

27. *See, e.g.,* Bailey *v.* Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951) (no hearing required for employee dismissed from government employment).

28. 397 U.S. 254 (1970).

29. Arnett *v.* Kennedy, 416 U.S. 134, 153-54 (1974).

30. 470 U.S. 532 (1985).

> such an interest, once conferred, without appropriate procedural safeguards."[31]

Those procedural due process cases are relevant to the broadcasters' takings claim because an implicit "bitter with the sweet" argument has consistently sustained the government's assertion that its substantially restrained regulatory authority over the behavior of broadcast licensees is essentially unconstrained by Fifth Amendment limitations. Proponents of regulation repeatedly point out that licensees have gotten a "sweet" deal, since they have received very profitable licenses at a price of zero. But the fact that the government has chosen an allocation method that gives licensees a sweet deal does not necessarily justify it in making regulatory decisions that are unreviewably bitter. The procedural due process cases suggest at the very least that the Court might find it intolerable "that the government should wield [such a] degree of potentially arbitrary power."[32] If so, the Court would have an opportunity to conclude that, for purposes of takings analysis, the "property" taken by the free TV mandates is that of the broadcasters, and compensation must be paid.

The Economic Realities of Broadcast Licenses Should Count for *Something*. The Court might conclude, with Thomas G. Krattenmaker and Lucas A. Powe, Jr., that though the empirical premises are weak and the logic flawed, "it is too late to argue that the government's claim to own the airwaves is invalid."[33] Contrary, perhaps, to conventional wisdom, such a conclusion would hardly support the broadcasters' takings claim. The reason is that

31. *Id.* at 541 (quoting Arnett *v.* Kennedy, 416 U.S. 134, 167 (1974)) (Powell, J. concurring in part and concurring in result in part).

32. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717-18 (1975).

33. KRATTENMAKER & POWE, *supra* note 1, at 227.

it would not speak at all to what is in fact the gravamen of that claim, namely the nature of the broadcasters' rights *during the term of their licenses*. Consider that complying with the free TV mandates would require broadcasters to forgo substantial income—as much as $500 million per two-year election cycle—from sales of broadcast time during the license term. The government has never contended that the *income* generated during the license term constitutes government property, nor has it ever questioned the legitimacy of the broadcasters' claims of entitlement to the income.

For their duration, broadcast licenses grant to licensees the functional equivalent of property rights: exclusive entitlement to and prohibition of interlopers from trespassing on their particular spectrum space. The sanctions to which licensees are subject if they broadcast outside the wavelengths covered by their licenses serve much the same function as fences around the borders of real property: they prevent encroachment upon assets to which the law grants others exclusive possession. Another fact indicating that licenses are the functional equivalent of property is that, despite being limited in duration, they are traded in an active market where prices clearly reflect buyers' expectations of uninterrupted long-term enjoyment. Moreover, of fundamental significance to the takings analysis is the fact that broadcasters' expectations of uninterrupted income streams are *investment-backed* and that broadcasters' investment in reliance on the continuation of the licensing regime is encouraged by a number of explicit FCC policies.[34] Regulations that disappoint distinct investment-backed expectations have long aroused the Court's most intense suspicion, particularly when the expectations have been formed and the investments made in explicit response

34. *E.g.*, Central Fla. Enterprises, Inc. *v.* FCC, 683 F.2d 503, 507 (D.C. Cir. 1982).

to and reliance upon government policies designed to encourage them.[35]

The more one contemplates the decline in the value of the licensees' discounted net revenue stream that complying with free TV mandates would cause, and the more one ponders the coercive reality of the wealth transfer that free TV would represent, the easier it is to penetrate the smokescreen of the public ownership trope. Hypothetical analogies help too. Suppose that the government leased a government building, of which it was clearly the owner, to tenant *A*. Suppose further that the lease itself said nothing about the government's retaining a right to reenter and claim even a temporary right of possession on behalf of tenant *B* (or anyone else). Suppose further that the government, during the term of the lease, mandated that tenant *A* surrender possession of a certain amount of its "prime rental time" (and concomitantly required tenant *A* to forfeit altogether the income that the right to possession would generate during that time) to tenant *B*. Suppose further that, in justifying its mandate that tenant *A* surrender temporary possession to tenant *B*, the government referred simply to the fact that it "owned the building" (implying that, despite the lease, the government could do whatever it wanted with the right to possession) and then went on to tout the great public benefits that "free occupancy by tenant

35. Penn Central Transp. Co. *v.* City of New York, 438 U.S. 104, 124 (1978) (Among the several factors of particular significance in determining whether a taking has occurred is "the extent to which the regulation has interfered with distinct investment-backed expectations."); Kaiser Aetna *v.* United States, 444 U.S. 164 (1979); *see also* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 219-26 (Cambridge University Press 1997); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (compensation should be required when claimant is deprived of "distinctly perceived, sharply crystallized investment-backed expectations").

B" would secure. Can anyone doubt that such behavior would be held to be a taking and that tenant *A* would be entitled to compensation? By a parity of reasoning, *at least as to licenses in effect at the time the free TV mandates were imposed,* the mandates would be a taking and the broadcasters entitled to compensation—even if the Court were to continue to embrace the public ownership metaphor.

Political Speech and the Television Set

A Different First Amendment for Broadcasters? "It is well settled that the First Amendment has a special meaning in the broadcast context."[36] Since *Red Lion Broadcasting Co., Inc.* v. *FCC*[37] was the case in which that First Amendment anomaly became well settled,[38] and since the free TV proposals are aimed directly at broadcasters, *Red Lion* is the most obvious starting point for our First Amendment analysis.

Red Lion. In *Red Lion*, the Supreme Court sustained both the FCC-promulgated fairness doctrine[39] and the

36. FCC *v.* Pacifica Foundation, 438 U.S. 726, 741-42 n.17 (1978).

37. 395 U.S. 367 (1969).

38. *Red Lion* was not the first case in which the First Amendment was given special meaning as applied to broadcasters. *See, e.g.*, NBC *v.* United States, 319 U.S. 192 (1943) (sustaining Chain Broadcasting rules against First Amendment challenge). It was, however, the first case in which the Court "enthusiastically embraced the concept of [broadcasting] regulation. It took the affirmative and reconceived the fundamental theoretical underpinnings . . . of the relationship between the press and government." LEE BOLLINGER, IMAGES OF A FREE PRESS 72 (University of Chicago Press 1991).

39. The fairness doctrine "imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Red Lion*, 395 U.S. at 369. In 1987, the FCC repealed the doctrine,

personal attack and political editorial regulations that the FCC issued pursuant to that doctrine.[40] The Court held that the commission had not exceeded its statutory authority and, more important for purposes of the present analysis, that the regulations "enhance[d] rather than abridge[d] the freedoms of speech and press"[41] and so did not violate the First Amendment.[42]

The broadcasters who challenged the regulations at issue in *Red Lion* made conventional First Amendment arguments that would in any other context—particularly in the context of a similar regulation of the print media—have easily carried the day.[43] Their claim was that

Complaint of Syracuse Peace Council, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043 (1987); the District of Columbia Circuit Court sustained the repeal, Syracuse Peace Council *v.* FCC, 867 F.2d 654 (D.C. Cir. 1989); and the Supreme Court denied certiorari, 493 U.S. 1019 (1990).

40. The personal attack rules required broadcasters to provide an opportunity to respond to a person whose "honesty, character, integrity or like personal qualities" were attacked during a presentation of views on a controversial issue of public importance; the political editorial rule required broadcasters who endorsed a candidate to offer reasonable opportunity for the candidate's opponent(s) to respond. *Red Lion*, 395 U.S. at 373–74.

41. *Id.* at 375.

42. Notice a fact that the Court in *Red Lion* failed to acknowledge: the idea that freedom can be *enhanced* by regulation is in significant and probably irreconcilable tension with the otherwise prevailing view that the First Amendment guarantees freedom *from* the exercise of governmental power. For a brief and useful historical analysis of *Red Lion*'s "enhancement theory," see Lucas A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 243–69; *see also* text accompanying notes 72–73, *infra*.

43. *Cf., e.g.*, Miami Herald Publishing Co. *v.* Tornillo, 418 U.S. 241 (1974) (invalidating a state law granting a right of reply to candidates attacked by a newspaper); New York Times Co. *v.* Sullivan, 376 U.S. 254 (1964) (holding that a public official cannot recover damages from a newspaper for false statements made in reference to his official conduct unless the false statement was made with "actual malice," that is, knowledge of falsity or reckless disregard of the truth).

> [n]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they [said], applies equally to broadcasters.[44]

The Court, however, unanimously decided that broadcasters' First Amendment rights were attenuated because broadcasting was different from other media. "[B]roadcast frequencies constitute[ ] a *scarce resource* whose use [can] be regulated and rationalized only by the Government."[45] Since there is no such thing as a *non*scarce resource, the Court must have believed that there was something unique about broadcast frequencies,[46] a peculiarity that rendered conventional market allocation mechanisms inapt and eliminated traditional First Amendment barriers to government control of content.[47] The following quotations from Justice White's opinion will help the reader to comprehend the Court's mind-set.

- The government constitutionally may license broadcasters to use the spectrum. "Licenses to broadcast do not

44. *Red Lion*, 395 U.S. at 386.

45. *Id.* at 376 (emphasis added).

46. *See* Turner Broadcasting Sys. *v.* FCC, 512 U.S. 622, 637 (1994) (*Turner I*) (observing that the Court's "distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium").

47. The Court has never specified or explained what it thinks constitutes the "unique" characteristic of broadcast frequency scarcity. Commentators have considered, and rejected, numerous possibilities. *See generally* Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101 (1993); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989). For now it is enough to note that *Red Lion* rests on the premise that broadcasting is "different" from other media and that the source of that perceived difference is the "unique scarcity" of the spectrum.

confer ownership of designated frequencies, but only the temporary privilege of using them."[48]

- "No one has a First Amendment right to a license [and] as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused."[49]

- "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[50]

- Finally, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[51]

From the time of its first articulation, critics have challenged the "scarcity" rationale that was so fundamental to the Court's thinking in *Red Lion*. They have disputed its empirical premises, the logic of the conclusions it generated, and the validity of the constitutional principle it endorsed. The Court in turn has acknowledged the criticism but so far has "declined to question [the rationale's] continuing validity as support for [its] broadcast jurisprudence."[52] The justices have not been presented with the kind of direct challenge to subsequent FCC (or congressional) regulations premised on scarcity that would have required the Court to

48. 395 U.S. at 394.
49. *Id.* at 389.
50. *Id.*
51. *Id.* at 390.
52. *Turner I*, 512 U.S. at 638.

confront the question. But if any of the free TV proposals were to be adopted by Congress or promulgated by the FCC on its own authority, they surely would provide an opportunity to mount such a challenge.

Since *Red Lion* has not been overruled, it must be considered to announce the First Amendment framework governing regulations of broadcast content. Its conceptual and empirical underpinnings are so vulnerable, however, that it must be regarded as unstable and thus not necessarily "good law." Accordingly, with respect to *Red Lion*, a study such as this must perform two tasks. First, it must apply *Red Lion* and its progeny to the proposals at issue, giving consideration to the very real possibility that even if *Red Lion* does continue to provide the governing analytical framework, the case does not necessarily authorize free TV mandates. Second, the study must summarize and assess "scarcity," the conceptual and empirical premise on which *Red Lion* was based. I begin with the second task.

On close scrutiny, scarcity reveals itself as a loosely defined concept whose denotation depends on the particular regulatory agenda that it is deployed to support. On even closer scrutiny, it does not support the broad proposition for which it is most commonly advanced, for whatever the meaning of the statement that "broadcast frequencies are scarce," it does not justify applying a more lenient First Amendment standard to broadcasters than is applied to newspaper publishers.[53]

Scarcity is sometimes used as a technological concept denoting the fact that if everyone broadcasts on the same frequency, none will be heard.[54] The implication of the

53. Telecommunications Research & Action Ctr. *v.* FCC, 801 F.2d 501, 508, *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (Bork, J.) ("[T]he attempt to use a universal fact [physical scarcity] as a distinguishing principle necessarily leads to analytical confusion.").
54. KRATTENMAKER & POWE, *supra* note 1, at 206.

observation is that government must devise some method to alleviate interference, as indeed it must. But that method need not include government management of broadcast content. All that is required is a method for allocating and enforcing rights in spectrum space.[55] The Court in *Red Lion* seemed to think that Congress had to eschew allocating spectrum frequencies with genuine property rights in favor of government licensing based on an ill-defined "public trustee" notion.[56] In truth, however, once one realizes that property rights are nothing more than legally enforceable claims to exclusive use, possession, and control of resources, one recognizes that there is no technological impediment to using property rights to prevent interference with spectrum allocations. Indeed, as my foregoing analysis makes clear, the present regulatory regime grants licensees rights that are functionally equivalent to property rights.

Another meaning of "scarcity" as a unique characteristic of the broadcast spectrum is that the spectrum is finite: whereas more trees can be grown, more spectrum cannot be created. That is an accurate statement, but it is incomplete and cannot carry the "spectrum is *uniquely* scarce" argument: although more spectrum cannot be created, additional frequencies have in the past and continue to become available as technology improves.[57]

A third possible denotation of spectrum "scarcity" is that there are fewer frequencies than there are people who want them. That too is an accurate but incomplete statement. The distinction it implicitly draws between pub-

55. *See* Time Warner Entertainment Co. *v.* FCC, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting from the denial of rehearing *en banc*) ("Alleviation of interference does not necessitate government content management; it requires, as do most problems of efficient use of resources, a system for allocation and protection of exclusive property rights.").

56. *See* text accompanying notes 36–45, *supra*.

57. KRATTENMAKER & POWE, *supra* note 1, at 208.

lishers and broadcasters, for example, is the product of a government-inflicted wound rather than an artifact of any natural, unique attribute of the spectrum.[58] The reason excess demand for publishing rights does not exist is that the price that emerges in the market for newspapers "brings supply and demand into equilibrium."[59] The regulatory scheme that the government has adopted for the spectrum does not work in that way. Instead, the government imposes barriers to entry and removes them only for its licensees, to whom it grants the rights for free. After that, the licensee can sell the license at whatever price the market will bear; meanwhile, the licensee will be entitled to all the revenues. When the supply of a revenue-producing asset is artificially limited, and then the asset is given away at a price of zero, there is bound to be "excess demand." But that kind of scarcity is unique to broadcasting only because, with respect to broadcasting but not with respect to print, the government has asserted ownership of an essential factor of production, proceeded to give it away rather than sell it, and prohibited intruders from encroaching.[60]

Finally, broadcasting's unique scarcity may denote the perception that broadcast channels are "peculiarly rare,"[61] in the sense that there are numerically fewer, or comparatively "too few," of them as compared with print outlets. The best answer to that argument resides in three facts: First, the number of available broadcast channels regularly increases. Second, technological advances such as cable TV render broadcast spectrum scarcity as a determinant of the

58. *Id.* at 217.

59. *Id.* at 209

60. Judge Stephen F. Williams refers to that variation of the scarcity rationale as "its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime)." *Time Warner Entertainment*, 105 F.3d at 724 (Williams, J., dissenting from denial of rehearing *en banc*).

61. *Id.*

number of available broadcast channels obsolete. Third, whereas the number of broadcast channels has actually increased in recent years, the numbers of daily and weekly newspapers has steadily declined.[62] One cannot respond to the "too few" argument with mere numbers or even with comparisons of growth rates of broadcast and print outlets, because the assertion that there are "too few" implies a baseline of "enough." But such a baseline of *enough*, in terms of which we could evaluate the adequacy of what we currently enjoy, does not exist.

The Public Forum as a First Amendment Variation of the Ownership Theme. Analyzing free TV proposals in terms of the public forum doctrine proves to be yet another exercise in conceptual legerdemain. The exercise begins with the assertion of government ownership of the spectrum, which as we have seen is a dubious claim at best. Nevertheless, here as elsewhere it provides a predicate of sorts upon which to build a defense against broadcasters' First Amendment objections to controls in general and free TV requirements in particular. In terms of public forum doctrine, the broadcasters' First Amendment claim in resistance to free TV would be that public ownership of the spectrum does not necessarily imply that the government has blanket authority to regulate the content of what is said over the airwaves. Indeed, the broadcasters might argue that public ownership cuts *against* rather than in favor of content regulation:

> Private and public rights, justified by independent arguments, may often restrict the manner in which the government may use resources that it owns. This argument applies with equal force to the "government-owned" spectrum. Just because the government "owns" the spectrum does not mean that it can control what is said there. Beyond certain "traffic" rules for the airwaves, the First Amendment may preclude governmental control. The extent of the First Amendment's control is defined by the public forum doctrines.[63]

62. KRATTENMAKER & POWE, *supra* note 1, at 216.

Application of the public forum doctrine requires that the government property in question be classified as either a *traditional*, a *designated*, or a *nonpublic* forum.[64] If the property is deemed a *traditional* public forum, such as a public street or a park that has "time out of mind, . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[65] the conventional doctrinal wisdom is that any regulation of access based on content will be subject to strict scrutiny and will not pass muster unless it is narrowly drawn to serve a compelling state interest. A content-neutral regulation of time, place, and manner of speech will be sustained if it is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication.[66] If the property is deemed a *designated* public forum, such as is created when the state voluntarily chooses to make property available for public expression, it is—so long as it is available for expression at all—subject to the same First Amendment standards as a traditional public forum. In *nonpublic* forums, government regulation of access and even government regulation of content are subject to considerably less rigorous scrutiny: the state may reserve such public assets for their intended purposes, communicative or otherwise, so long as the

63. Spitzer, *supra* note 47, at 1029.

64. Perry Educ. Ass'n *v.* Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

65. Hague *v.* CIO, 307 U.S. 496, 515 (1939).

66. *Perry*, 460 U.S. at 45.

regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[67]

With regard to the constitutionality of free TV, it is possible to spin the public forum categories and their attendant implications so that they point in more than one constitutional direction. According to Professor Matthew L. Spitzer, for example, the kind of controls represented by a free TV requirement might be constitutional on the following reasoning:

> Electromagnetic spectrum, which is neither a street nor a park, is not a traditional public forum. Because the government's system of licensing and content controls predicated thereon precludes any inference of an intent to open the airwaves to all who wish to participate, the electromagnetic spectrum has not been designated a public forum. Therefore, the Court might conclude, the electromagnetic spectrum is only a nonpublic forum, subject to whatever reasonable regulations on speech and access the government wishes to promulgate. Clearly, licensing is a reasonable method of precluding interference, and the content controls that are predicated on licensing are a reasonable adjunct to licensing. They are not only intended to provide an equitable distribution of licenses, but also to guarantee uninterrupted access to the media by the public. Therefore, the existing system of licensing and content controls [and, by extension, the proposed free TV for candidates mandates are] constitutional, as long as broadcasters are not precluded from gaining licenses because of their viewpoints about issues that will be the subject of broadcasts.[68]

67. *Id.* at 46.

68. Spitzer, *supra* note 47, at 1038–39. Professor Spitzer confesses that the results in the public forum cases "are sufficiently disparate that [he] cannot be certain about how the public forum doctrines might be applied to radio spectrum." *Id.* at 1039 n.291.

In other words, Professor Spitzer's argument suggests that public forum doctrine might *permit* government to require broadcasters to provide free TV: spectrum is a nonpublic forum owned by government, merely licensed to broadcasters, and government may determine who has access and for what kind of message.

According to Professor William W. Van Alstyne, by contrast, it is possible to argue that the First Amendment might *mandate* "third party rights of access to a broadcast frequency," which is what free TV for candidates would amount to, on the "basis that the frequency is public property and a natural public forum with regard to which the government cannot, constitutionally, discriminate" in favor of licensees.[69] Professor Cass R. Sunstein has endorsed a somewhat similar argument.[70]

Although each may have a superficial credibility, neither of those spins makes a persuasive case that the public forum doctrine offers constitutional support to the free TV proposals. Indeed, neither ultimately persuades that the doctrine is genuinely to the point.[71] But notice how different they are and, accordingly, how the source of their weakness varies. The first theory props up the free TV proposals by what is essentially a prerogative-of-government-ownership argument that puts all First Amend-

69. WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 543 (Foundation Press, 2d ed. 1995).

70. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 103 (Free Press 1993).

71. *See* Robert M. O'Neil, *Broadcasting as a Public Forum, in* RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA 125 (Robert Corn-Revere ed., The Media Institute 1997) (arguing that public forum doctrine is inapt in the broadcasting context and that "licensed broadcast outlets and cable systems cannot properly be classified as public fora for purposes of determining access.").

ment objections to government control—those of broadcasters and of ordinary citizens alike—on the same feeble footing. That argument founders on the conceptual emptiness of the claim of government spectrum ownership, which provides illusory cover for what is in reality a naked assertion of regulatory power.

The second theory props up the free TV proposals by using the utterly different strategy of implicitly claiming that free TV is *required* because it would vindicate *citizens'* First Amendment rights. The theory is a variation on the *Red Lion* "rights of listeners and viewers" theme. It is worth noting that *Red Lion* is the single exception to the long line of cases unequivocally rejecting its fundamental premise that the First Amendment is a sword that gives the government power rather than a shield protecting citizens *from* government.[72] In addition, apart from *Red Lion*, the Court has never itself attempted to put doctrinal flesh on the bare bones of its assertion of viewers' and listeners' rights.[73]

***Red Lion* Applied.** The scarcity argument upon which *Red Lion* was based has been so profoundly discredited—its conceptual underpinnings so thoroughly undermined, its empirical premises so utterly annihilated—that it provides scant support indeed for the current disparity in First Amendment protection enjoyed by broadcasters and the

72. For a discussion, and rejection, of the so-called affirmative theory of the First Amendment, *see* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985).

73. *Cf.* Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980) (arguing that despite the fact that there is a crucial link between constitutionally prescribed processes and the First Amendment, the idea that the people have an enforceable "right to know" cannot be sustained as a matter of constitutional principle).

print media. Nevertheless, until the Supreme Court explicitly overrules it, one must contend with its doctrinal implications. But even if *Red Lion* itself is still "good law" in the sense that the Court would adhere to its underlying rationale, it does not necessarily confer a constitutional blessing on free TV mandates. The Court has sanctioned two different schemes that more or less *required* certain content to be broadcast. In other cases, it has both permitted the FCC to impose a more onerous ban on broadcast speech than would have been permissible to impose on print media[74] and invalidated a congressionally imposed prohibition of certain broadcaster speech.[75]

Each of the two "required content" schemes is distinguishable in important ways from the free TV mandates. One of them was *Red Lion* itself, in which the Court sustained the fairness doctrine and the personal attack rules. With respect to the fairness doctrine, it is easy to forget how much discretion the broadcasters retained over the way in which—in what format, at what length, and with respect to what issues—they were to fulfill their obligation. Theoretically at least, although fulfilling the obligation might affect their programming decisions somewhat, they retained sufficient control of their program content so that they could minimize their financial losses. With respect to the personal attack rules, while they did require that broadcasters give "free" access to the victims of personal attacks, broadcasters could avoid bringing the obligation into play simply by not engaging in personal attacks. In other words, both the fairness doctrine and the personal attack rules left the broadcaster with significant discretion about

74. FCC *v.* Pacifica Foundation, 438 U.S. 726 (1978) (sustaining FCC ban on "indecent" programming). *Pacifica* is not relevant to the present discussion because the rationale for the regulation there at issue was a combination of the need to protect children and captive audiences and the pervasiveness of the broadcast media.

75. FCC *v.* League of Women Voters, 468 U.S. 364 (1984).

how to structure broadcast content. The free TV proposals, by contrast, appear to leave the broadcasters with virtually no discretion about how to fulfill the obligation and no means of escaping it.

The other "required content" case was *CBS, Inc.* v. *FCC*.[76] The Supreme Court there sustained the FCC's reading of section 312(a)(7) of the Communications Act of 1934 to create an affirmative, promptly enforceable right of reasonable access to broadcast stations for individual candidates seeking federal office.[77] The case is far from being controlling authority on the constitutionality of free TV mandates, however, since section 312(a)(7) required broadcasters to *sell* time to candidates, not to give it away as free TV would require. Moreover, even under the rule in *CBS*, broadcasters were left with considerable discretion about how to meet their obligation.

The case that invalidated a congressionally imposed speech prohibition may cut against the free TV mandates' constitutionality under *Red Lion*. In *FCC* v. *League of Women Voters*,[78] the Court rejected section 399 of the Public Broadcasting Act of 1967, which prohibited any noncommercial educational station that received a grant from the Corporation for Public Broadcasting to "engage in editorializing."[79] The Court accepted the government's assertion that section 399 was designed to "safeguard the public's right to a balanced presentation of public issues,"[80] but it was troubled by the fact that the purpose was accomplished by "directly [prohibiting] the broadcaster from

76. 453 U.S. 367 (1981).
77. 47 U.S.C. § 312(a)(7).
78. 468 U.S. 364 (1984).
79. 47 U.S.C. § 390 *et seq.*
80. 468 U.S. at 385.

speaking out on public issues."[81] Although the free TV proposals would not share the "direct prohibition" vice, *League of Women Voters* suggests that the Court would strictly scrutinize them despite *Red Lion*—and strict scrutiny is a process that usually proves fatal to challenged regulations.[82] The likelihood of strict scrutiny stems from the fact that free TV, like section 399, is "specifically directed at [expression] that lies at the heart of First Amendment protection,"[83] so the Court will "be especially careful in weighing the interests that are asserted [and] in assessing the precision with which"[84] the regulations are crafted.

The Same First Amendment Rights for Broadcasters? *League of Women Voters* suggests that, even under a constitutional regime in which *Red Lion* is good law, free TV might have to undergo usually fatal strict scrutiny. What would be free TV's fate if we assume instead that *Red Lion* is not good law? The doctrinal issues here are not difficult to formulate. Even when the analytical path is not obscured by the scarcity and public ownership smokescreens, however, resolving the issues is no simple task.

One thing is clear: Congress could not compel the print media to offer a right to reply to candidates similar to the compelled right of reply imposed on broadcasters and affirmed in *Red Lion*.[85] In addition, the Court has on many

81. *Id.*
82. As Professor Gerald Gunther once observed, scrutiny that is strict in theory is usually "fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
83. 468 U.S. at 381.
84. *Id.* at 382.
85. Miami Herald Publishing Co. *v.* Tornillo, 418 U.S. 241 (1974).

occasions held that private parties may not be required to affirm,[86] distribute,[87] or offer a forum to[88] points of view or beliefs with which they disagree. Those holdings suggest that the Court would look with suspicion on the free TV mandates since they would require broadcasters to give time to candidates whether they agreed with the candidates or not.

On the other hand, the Court in *PruneYard Shopping Center* v. *Robins* has sustained against a First Amendment challenge a state court's reading of a state constitutional provision to prohibit private shopping center owners from denying access to petition circulators.[89] And in *Turner Broadcasting System* v. *FCC (Turner II)*,[90] the Court, albeit narrowly, sustained the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 in the face of the cable operators' vigorous First Amendment challenge. *PruneYard* and *Turner II* suggest that the mere fact that free TV would compel broadcasters to carry speech at times not of their own choosing with candidates' expressing views with which the broadcasters might disagree would not necessarily condemn the mandates to First Amendment death. Mandated free TV would, however, condemn them to run a highly nuanced gauntlet of First Amendment questions.

86. Wooley *v.* Maynard, 430 U.S. 705 (1977) (state may not punish individuals who cover up the state motto "Live Free or Die" on their license plates); West Virginia State Bd. Educ. *v.* Barnette, 319 U.S. 624 (1943) (compulsory flag salute violates First Amendment).

87. Pacific Gas & Elec. Co. *v.* Public Utils. Comm'n, 475 U.S. 1 (1986) (private utility company may not constitutionally be required to distribute speech of a third party with which it disagrees).

88. Hurley *v.* Irish Am. Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (private parade organizers may not be required to offer parade space to a group propounding a message with which the organizers disagree).

89. 447 U.S. 74 (1980).

90. 117 S. Ct. 1174 (1997).

Content-Based or Content-Neutral? First is the question of whether the Court would deem free TV to be a control on the *content* of speech. If so, strict scrutiny would ensue, and the mandates would be struck down unless they were finely tuned to serve a compelling state interest—"some pressing public necessity, some essential value that has to be preserved"[91]—with the least restrictive means. On the other hand, if the Court deemed free TV to be content-neutral, the justices would subject it to less demanding review and would sustain it if they thought it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[92]

In one of its more stunning understatements, the Court has acknowledged that "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task."[93] Especially is that true when the regulation does not on its face discriminate among viewpoints but instead, like the free TV proposals, proceeds in terms of

91. *Turner I*, 512 U.S. at 680 (O'Connor, J., dissenting).

92. United States *v.* O'Brien, 391 U.S. 367, 377 (1968).

93. *Turner I*, 512 U.S. at 642-43. The Court elaborated:

> We have said that the "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." . . . The purpose, or justification, of a regulation will often be evident on its face . . . . But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

Id. (citations omitted).

subject matter, format, or speaker identity.

The Court's decision regarding whether free TV is content-based vis-à-vis the broadcasters will turn in part on the extent to which it regards the mandates as a function of the content of the speech that the *broadcasters* would otherwise utter. In describing the majority's conclusion that must-carry is content-neutral, Justice Anthony Kennedy noted in *Turner I* that the obligation "interfered with cable operators' editorial discretion by compelling them to offer" programming not of their own choosing (and at a considerable loss of revenue). Still, he emphasized, "the extent of the interference does not depend upon the content of the *cable operators*' programming."[94] If that reasoning were to be applied to the free TV mandates, they too would be found content-neutral: they would interfere with broadcasters' editorial discretion and cause them considerable financial pain,[95] but the interference would not be a function of or in any way related to the content of the *broadcasters*' programming.

But the Court's decision regarding whether free TV is content-neutral may not treat as controlling the fact that the required candidate access is not a function of the broadcasters' speech. Instead, what might matter most is that the mandates are speaker-identity, subject-matter, and format-specific. True, the mandates do not single out particular viewpoints for more or less favorable treatment. Apart from the fact that they lack that inevitably fatal flaw, it is hard to imagine regulations that would be less content-neutral: looked at through the lens of what they require of candidates to become entitled to their benefits, they not only prescribe the generic class of qualified speakers (certain candidates for federal office) but also dictate the subject matter and the format of the speech. In rejecting strict scrutiny in *Turner I*, the Court noted several significant features of the must-carry obligations that free TV proposals do not share. Must-carry was found to be content-neutral because Congress did not design it "to promote speech of a particular content" nor "as a means of ensuring that particular programs will be shown."[96] The free TV requirements, on the other hand, would ordain the topic and are plainly designed to guarantee that certain kinds of speech will be broadcast. Moreover, in *Turner I* the Court noted with approval in connection with federal funding of noncommercial stations through the Corporation for Public Broadcasting that "the Government is foreclosed from using its financial support to gain leverage over any programming decisions."[97] And it reiterated its long commitment to negating the "risk of an enlargement of government control over the content of broadcast discussion of public issues"[98]—a risk that would materialize in spades should the free TV mandates be implemented.

When the Court said that deciding whether a particular regulation is content-based is "not always . . . simple," it could well have gone on to state the analytic corollary: *predicting* what the Court will decide is an exercise in guesswork, hunch, and intuition every bit as much as it is an exercise in case parsing and straightforward legal analysis.[99] The jurisprudence of content control would give a Court determined to engage in lenient review a plausible if not wholly persuasive rationale for doing so. To me, however, it seems more likely that the Court will find the free

94. *Id.* at 644 (emphasis added).

95. The most common estimate of cost is $500 million per two-year election cycle, an amount that Paul Taylor thinks is "small change to the industry." Taylor, *Fat Cat Broadcasters*, *supra* note 22, at 2.

96. *Turner I*, 512 U.S. at 649–50.

97. *Id.* at 651.

98. *Id.* at 652 (citation omitted).

99. The best general treatment is Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

TV mandates content-based, if only as a means of establishing a predicate for strictly scrutinizing them. The free TV mandates would embody such intrusive, particularistic, and overbearing governmental judgments regarding the conduct of political campaigns that the Court will almost certainly insist on a painstaking and skeptical evaluation of the goals they supposedly serve and their aptness as means. And as most Court watchers know, scrutiny that is strict in theory is almost always fatal in fact.

Even if the Court were to determine that the free TV mandates are content-neutral, however, so that they would be given only intermediate scrutiny, they would have a difficult time passing constitutional muster. A regulation's surviving *O'Brien*'s less exacting inquiry into means-ends relationships still requires the Court to be persuaded that the government's interest is important, substantial, and unrelated to the suppression of free expression. In addition,

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[100]

Regardless, therefore, of whether the Court applies strict or intermediate scrutiny to the free TV mandates, it will have to discern, articulate, and assess the government's interest; it will have to determine whether the interest is related to the suppression of expression; and it will have to gauge the mandates' effectiveness in terms of the posited goals. I now turn to the analysis of those matters,

100. *Turner I*, 512 U.S. at 664 (quoting Quincy Cable TV, Inc. *v.* FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

all of which—if the Court takes them seriously—bode ill for the constitutional fate of the free TV proposals.[101]

The Government Interest. Supporters have asserted that free TV would accomplish four principal goals. First, by "striking a blow at paid political advertising—the single most expensive part of any political campaign,"[102] free TV would, in the words of President Clinton, "diminish the impact of excessive money" in politics.[103] Second, by fostering a "campaign discourse that favors words over images and substance over sound bites,"[104] free TV would "raise the level of discourse. And it would serve as an

101. Note two caveats. First, since proponents of free TV have to date offered no sustained defense of their idea, it is possible that they would characterize or formulate the interests that the mandates supposedly serve differently from the way they have done so far. It is also possible that different formulations of the goals they seek to accomplish would substantially affect the Court's assessment of the state's interest. Thus, what I offer here is an effort to articulate and evaluate free TV's goals as they have until now been enunciated. Should different goals be posited, different evaluations might emerge. Second, since the analysis here is of generic free TV proposals, rather than of any particular species of mandate, my examination of means-end relationships will be less finely grained than were it to focus on a specific plan.

102. Representative Louise Slaughter (D-N.Y.), Press Release on the occasion of her Introduction of H.R. 84: Fairness in Political Advertising Act, which "would require television stations to offer free television time to candidates for statewide or federal office in exchange for renewing or receiving their broadcasting license." Mar. 11, 1997.

103. *Remarks to the Conference on Free TV and Political Reform and an Exchange with Reporters*, 33 WEEKLY COMP. PRES. DOC. 330 (Mar. 11, 1997) [hereinafter *Clinton Remarks on Free TV*].

104. Lawrence O'Rourke, *One Idea to Halt TV Money Rush: Make Ads Free*, SACRAMENTO BEE, May 27, 1997, at A12 (quoting Paul Taylor) ("'Free time would reduce negative advertising. . . . By requiring that candidates talk directly to the camera, free time would raise the level of campaigns. . . . The goal is not to dull the thrust-and-parry of politics but to foster a campaign discourse that favors words over images and substance over sound bites.'").

antidote to the unregulated hit-and-run campaigning of outside groups . . . and the civic corrosion of political attack ads."[105] Third, free TV would "equalize the playing field."[106] And fourth, because "deceptive television ads . . . deepen cynicism and depress turnout,"[107] free TV would, again in the words of President Clinton, restore the "broad confidence of the American people but also of the American press that comments on it."[108]

Whether one characterizes them as trivial or important, vapid or substantial, the first of those four goals is highly problematic in First Amendment terms. It conflicts fundamentally and profoundly with the amendment's core premises. The elaborate and sometimes mystifying doctrinal framework that characterizes First Amendment jurisprudence sometimes tempts regulators to forget that the cases rest on a remarkably solid and unyielding foundation of political freedom.[109] The governing principles celebrate the

105. Paul Taylor, *Create a TV Time Bank*, NEW DEMOCRAT, May-June 1997, at 14.

106. Slaughter, *supra* note 102.

107. Paul Taylor, *quoted in* Jacqueline Myers, *Election Over but Not Campaign; Campaign for Free Air Time for Political Candidates*, 85 THE QUILL 10 (Jan. 1997).

108. Clinton, *Remarks on Free TV*, *supra* note 103.

109. I have previously argued:

> The government may not interfere in [citizens'] efforts to persuade their fellow citizens of the merits of particular proposals; nor may it disrupt the free communication of their views, nor penalize them for granting or withholding their support from elected officials on the basis of the positions those officials espouse. Government may neither prescribe an official orthodoxy, require the affirmation of particular beliefs, nor compel citizens to support causes or political activities with which they disagree. Government may neither punish its critics nor impose unnecessary burdens on their political activity. . . . To remain faithful to those principles, one must be vigilant to detect the costs to freedom lurking in reform proposals that come dressed as benign efforts to achieve a healthy politics.

Lillian R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, CATO INSTITUTE POLICY ANALYSIS no. 282, at 22 (Sept. 4, 1997) (footnotes omitted) [hereinafter *Campaign Finance "Reform"*].

110. 424 U.S. 1 (1976).

111. For a description and analysis of the cases, *see* BeVier, *Campaign Finance "Reform,"* *supra* note 109, at 26-29.

112. 424 U.S. at 57 (emphasis added).

liberty of individuals and private associations to decide for themselves what resources to devote to political activity and abjure the idea that government may regulate, judge, or in any way control the substance or quality of political debate.

Buckley v. *Valeo*[110] is the flagship case that translated those principles into doctrine in the specific context of campaign finance regulation. Not only has *Buckley* not been overruled, but it has stood as a remarkably robust precedent in the seven major campaign finance regulation cases that the Court has decided since.[111] *Buckley* denies government the power to pursue the first goal asserted for free TV. A straight-faced argument that government may regulate campaign activity so as to "diminish the impact of excessive money" in politics would be virtually impossible to maintain in the teeth of the following straightforward Supreme Court pronouncement:

> The First Amendment *denies government the power* to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is *not the government but the people*—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[112]

No single flagship case crystallizes the First Amendment's hostility to government efforts to "improve the conduct and discourse of politics" or to "combat negative campaigning." Time and again, however, the Court has extolled our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[113] While the Court has acknowledged that there is no constitutional value in false statements of fact,[114] it has held that the commitment to uninhibited debate is a virtual trump that substantially limits the ability of public officials to recover damages from defendants who utter false statements about their official performance.[115] Time and again, too, the Court has affirmed that the freedoms protected by the First Amendment are "delicate and vulnerable" and must have adequate "breathing space" to survive.[116] For example, the Court is convinced that trying to protect public discourse from "outrageous" speech would have an "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[117] Accordingly, a public official may not recover damages for intentional infliction of emotional distress without showing that the offending publication contains a false statement made in reckless disregard of the truth.[118] And time and again the Court has defended the proposition that "governmental bodies may not prescribe the form or content of individual expression":[119]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[120]

In light of those often eloquently stated and consistently affirmed First Amendment principles, the second goal sought by proponents of free TV for candidates appears to be out of constitutional bounds. No precedent supports the use of government's coercive power to improve the discourse of politics and combat negative campaigning, whereas the precedents prohibiting pursuit of such a goal are abundant and unwavering.

Buckley v. *Valeo* provides limited guidance on the issue of whether the government may pursue the third goal asserted in behalf of free TV, namely that of "equalizing the playing field." The Court in *Buckley* expressed hostility to equalization efforts: "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to

113. New York Times Co. *v.* Sullivan, 376 U.S. 254, 270 (1964).

114. *See, e.g.*, Gertz *v.* Robert Welch, Inc., 418 U.S. 323, 344 (1974).

115. *See, e.g.*, New York Times Co. *v.* Sullivan, 376 U.S. 254 (1964).

116. NAACP *v.* Button, 371 U.S. 415, 433 (1963).

117. Hustler Magazine *v.* Falwell, 485 U.S. 46, 55 (1988).

118. *Id.*

119. Cohen *v.* California, 403 U.S. 15, 24 (1971) (reversing the conviction, for disturbing the peace, of a defendant who was observed in the corridor of a municipal court building, wearing a jacket bearing the words "Fuck the Draft").

120. *Id.*

the First Amendment."[121] Providing free TV for all federal candidates does not necessarily fall under that prohibition. Mandating that broadcasters provide free TV time would restrict *their* speech—or at least their editorial discretion—but it would not do so to enhance the relative voice of their *competitors*. It would attempt to equalize the relative voices of candidates vis-à-vis one another, but in doing so it would not restrict any *candidate's* speech.

Under *O'Brien*, though, the goal of "equalizing the playing field" of speech opportunities enjoyed by candidates vis-à-vis one another seems likely to be found to be a goal that is not unrelated to the suppression of free expression, since the need to equalize is a function of differences in communicative impact that would presumably arise absent equalization. A conclusion that such is the case would not necessarily be fatal to the attempt to pursue the goal, but it would dictate that the Court engage in explicitly strict scrutiny.[122]

Only the fourth of the goals that free TV would supposedly accomplish—namely, the goal of restoring the confidence of the American people—seems likely to be unequivocally endorsed by the Court. The Court has never held such a goal to be illegitimate. Indeed, in one case where a similarly formulated goal—that of "preventing diminution of the citizen's confidence in government"[123]—was asserted in defense of a prohibition of corporate campaign speech, the Court called it a goal "of the highest importance."[124] Despite that, the Court determined that the interest was

121. *Buckley*, 424 U.S. at 48–49.

122. For a discussion of how a finding that a governmental interest is not unrelated to the suppression of free expression "switches" the Court to a "substantially more demanding" level of scrutiny, *see* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

123. First National Bank *v.* Bellotti, 435 U.S. 765, 787 (1978).

124. *Id.* at 789.

insufficient to sustain the speech regulation there at issue, because no evidence existed to support the government's claim that democratic processes were being undermined by the practices in question.[125]

The Relationship of Means to Ends. Assume *arguendo* an unlikely proposition, namely, that the Court would find all four of free TV's posited goals to be important and constitutionally legitimate. The next task for proponents would be to demonstrate that the goals are real, not merely conjectural or rhetorical, and that free TV would achieve them in a direct and immediate way. Here, unless they are able to come up with more substantial evidence than they have produced to date, the proponents are likely to founder. Indeed, it is as apt to note of the free TV proposals as of the recent spate of campaign finance regulations that they are neither

> premised on empirical analysis, nor derived from established postulates, nor defended in terms of predictions about testable results. Rather [they] rest on pejorative and highly charged rhetoric, [are] formulated in ill-defined but evocative terms, and . . . defended with extravagant claims about benign effects. Yet upon analysis, the picture the [free TV proponents] paint—both of political reality and of the goals of reform—is so vague that it begs all the important questions.[126]

Merely posing some of the questions that the free TV proposals beg makes the analytical point. First, even assuming that reforming "skyrocketing costs of running" for office is a legitimate legislative project, how could giving federal candidates free TV time keep overall costs down?

125. *Id.*

126. BeVier, *Campaign Finance "Reform," supra* note 109, at 24.

Since any effort actually to *prohibit* candidates from continuing to spend on their campaigns would run into an impenetrable constitutional barrier,[127] what besides wishful thinking would prevent candidates from using the money saved by free TV to engage in other expensive campaign maneuvers?

Second, again confronted by the impenetrable constitutional barrier to candidate spending limits, so that candidates with access to more resources could continue to spend more even after accepting free TV, how would providing free TV to less well-financed candidates "equalize the playing field"? Even if proponents somehow found a way to equalize the total spending of candidates accepting free TV, how would the incumbent's already considerable advantage be "equalized" away?

Third, given that direct regulations of, or prohibitions regarding, the content and quality of political discourse are placed beyond legislative power by the First Amendment, how would merely providing free TV time to candidates "foster a campaign discourse that favors words over images and substance over sound bites"?

Fourth, what evidence exists that citizens were actually and to their detriment *misled* by what proponents of free TV claim were "deceptive" ads in the 1996 campaign or at other times? And even if citizens were, why is it not enough that the candidates are free to engage in counter speech? (Do we really want the government to monitor the truthfulness of campaign speech, to begin canvassing past campaign speech and voters' reaction to it, to determine whether all the claims were true and, if not, whether citizens were misled by false claims? The implications of such an inquiry are truly devastating to the idea of a "self-governing" people.) Moreover, if citizens have recently become more cynical about politics and have lost some of

127. *Buckley*, 424 U.S. at 82.

their confidence in government, what evidence supports the claim that such a phenomenon is accounted for by the way politicians *campaign* rather than by the way they *behave when in office*?

Finally, upon what evidence do advocates of free TV think that "there is a real hunger for political information,"[128] and what makes them think that free TV would satisfy that appetite? Upon what evidence do they conclude that citizens hungry for political information cannot find plenty to satisfy them from the rich and varied menu now provided by the free—that is, genuinely *un*regulated—political debate?

If the Court takes at all seriously its obligation to call what appears on the present state of the evidence to be a rhetorical bluff of free TV's proponents—if it truly requires them to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"[129]—the proponents will have to come up with well-founded answers to the kinds of questions posed above. They will, in other words, have to offer a defense much more solid than the vague generalities and unsupported assertions about causes and effects that they have offered so far.

The First Amendment Rights of Candidates. The implicitly skeptical empirical premise of the foregoing rhetorical questions is that, unless it is bolstered by significant additional constraints, free TV alone will do little to accomplish its proponents' highly touted goals. Accordingly, the proposals contemplate regulating the speech of candidates who accept free TV by exacting some kind of quid pro quo from them: candidates must agree to appear in person, to

128. James Bennett, *Perils of Free Air Time*, N.Y. TIMES, Mar. 13, 1997, at A1 (quoting Paul Taylor).

129. *Turner I*, 512 U.S. at 664.

face the camera, to talk for a specified length of time, or to accept limits on overall campaign spending, or they must agree to all of those conditions. Restrictions like those—on the quality, quantity, content, or format of political campaign speech—would surely not be tolerated if Congress or the FCC attempted to impose them as free-standing rules.[130] Proponents of free TV may think that the restrictions will enjoy a different constitutional fate if they are defended as reasonable conditions on candidates' receipt of governmentally provided subsidies. But proponents would be mistaken.

Proponents would begin their defense of the conditions by analogizing them to provisions implicitly endorsed by the Court in *Buckley*, when it qualified its otherwise unequivocal rejection of expenditure limitations:

> Congress may engage in public funding of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.[131]

Proponents of free TV would also cite *Rust* v. *Sullivan*,[132] in which the Court sustained against First Amendment challenge a Department of Health and Human Services "gag rule" that prohibited recipients of federal family planning funds from providing abortion information. The Court held that the gag rule was a permissible means of safeguarding the integrity of the government program for which taxpayer funds were being expended.[133]

130. *See* text accompanying notes 97–105, *supra*.

131. *Buckley*, 424 U.S. at 57 n.65.

132. 500 U.S. 173 (1991).

133. *Rust*, 500 U.S. at 196 ("the Government is simply insisting that public funds be spent for the purposes for which they were authorized").

Proponents of free TV would reason that because candidates would receive free TV time, *Buckley* and *Rust* would support the imposition on them of quality, content, or format restrictions to achieve the purposes of the government program. But neither *Rust* nor *Buckley* would support them because the key fact in both cases was that the subsidy was supplied *by the taxpayers*. The key fact about free TV, on the other hand, is that the subsidy would be provided *by the broadcasters*.

Indeed, analysis of free TV in terms of *Buckley* and *Rust* exposes the proposals for the constitutional shell game that they are. Broadcasters would have no First Amendment rights to resist compliance with the free TV mandates, proponents say, because spectrum scarcity or some variation of the public ownership trope permits government to regulate licensees' speech in the public interest; they would have no Fifth Amendment right to compensation because the "property" to be taken does not "belong" to them; and candidates would have no First Amendment right to resist compliance with the format, quality, or content controls, because they would be permitted to speak for free. It does not require X-ray vision to detect the conceptual emptiness of that series of tricky doctrinal maneuvers. The First Amendment edifice of political freedom that the Court has so painstakingly constructed seems unlikely to yield to such transparently feeble arguments on behalf of overbearing government control.

The Proposals Assessed

The basic idea of free TV for political candidates lacks a constitutional foundation. Nor can it be justified in policy terms. Those conclusions do not fundamentally change depending on which particular proposal one considers: the

constitutional devil in those proposals lurks in their very conception, while the policy devil lurks in the mismatch of ends and means that inevitably follows when policymakers attempt to give real-world shape to basically ill-conceived notions. Since that is the case, quibbling over regulatory detail at this stage of the debate would be unproductive. Thus, this monograph does not undertake either to describe or to examine the particulars of any of the proposals. Indeed, President Clinton's call for free TV for political candidates in his 1998 State of the Union address, and the surfacing of such a proposal by FCC Chairman William Kennard immediately thereafter, suggest that the details of perhaps the most prominent proposals have yet to be determined.[134]

The Proposals. To enhance appreciation of the constitutional and policy issues that they raise, I briefly summarize the most prominently touted of the plans—two that have been introduced in Congress and one that has been advocated by a private group.

The McCain-Feingold Bill. One version of the McCain-Feingold Bipartisan Campaign Reform Act of 1997, S. 25, included a free TV time provision. It would have amended section 315 of the Communications Act of 1934,[135] the "equal time for candidates" provision, to require broadcasting stations within a candidate's state or an adjacent state to provide "eligible" Senate candidates with thirty minutes of free prime broadcast time.[136] To become "eligible" for the time, Senate candidates would have had

134. Lawrie Mifflin, *State of the Union: Political Broadcasts; F.C.C. Plans to Take Look at Free Political Broadcasts*, N.Y. TIMES, Jan. 29, 1998, at A19.

135. 47 U.S.C. § 315.

136. S. 25, 105th Cong., 2d Sess. § 102 (1997).

to agree to abide by campaign spending limits and to limit their acceptance of contributions from out-of-state donors.[137] No single station would have had to provide more than fifteen minutes of free time; and candidates would have been required to use the time in segments of not less than thirty seconds or more than five minutes.[138] Within a certain prescribed time before an election, the bill would in addition have required stations to sell broadcast time to eligible candidates at 50 percent of the station's "lowest charge . . . for the same amount of time for the same period on the same date."[139]

The Slaughter Bill. In March 1997 Representative Louise Slaughter, a Democrat from New York, introduced H.R. 84, the Fairness in Political Advertising Act. In exchange for receiving or renewing a broadcast license, the act would have required broadcasters to offer free TV time to candidates for statewide or federal office.[140] Stations would have been required to offer an equal amount of free time per candidate, but not less than a total of two hours and in units of not more than five minutes and not less than ten seconds. No broadcaster would have been required to provide more than four and a half hours per week. Candidates would have been required to speak directly into the camera.[141]

Free TV for Straight Talk Coalition. The privately organized Free TV for Straight Talk Coalition, founded by former *Washington Post* reporter Paul Taylor, has joined with a group of scholars—Norman J. Ornstein of the

137. *Id.* at § 503.

138. *Id.* at § 502.

139. *Id.* at § 103.

140. H.R. 84, 105th Cong., 2d Sess. § 2(a) (1997).

141. *Id.* at § 2(c).

American Enterprise Institute, Thomas E. Mann of the Brookings Institution, Michael J. Malbin of the State University of New York at Albany, and Anthony Corrado, Jr., of Colby College—in endorsing the creation of a "broadcast bank." Although the "broadcast bank" proposal has taken a number of slightly different forms, its broad outlines have remained essentially as follows. Every radio and TV station in the country would be required to contribute at least two hours of prime spot time each two-year election cycle. The contributions would be deposited into a broadcast bank. They would be assigned a monetary value based on market rates where they originated, and the bank would distribute vouchers denominated in money to the Federal Election Commission, which would in turn dispense them. Half the value of the vouchers would go directly to House and Senate candidates who qualified for them by raising over a threshold amount in small contributions from their own districts or states, and the other half would go to the parties, which could distribute the vouchers as they deemed most prudent, given their electoral prospects and the relative strengths and weaknesses of their slates of candidates. Candidates and parties could use the vouchers at any stations they wished, but no message could be less than sixty seconds long. The candidate would be required to appear on screen for the duration of the TV message, and the candidate's voice would be required for radio messages. At the end of every election cycle, the bank would reimburse stations that redeemed more than two hours' worth of free time with proceeds that it would collect from stations that redeemed less. Candidates wishing to purchase time outside the broadcast bank system would be free to do so, but at full market rates: the existing requirement that broadcasters charge political candidates the lowest unit rate for paid political advertising would be repealed.[142]

142. *New Campaign Finance Reform Proposals for the 105th Congress* (issued Dec. 17, 1996; revised May 7, 1997); Reforming Campaign Finance, BROOKINGS HOME PAGE, http:/www.brookings.org/gs/newcfr/reform.htm. One version of the broadcast bank plan plays a variation on that theme. It would finance the plan by an explicit trade-off, repealing the lowest unit rate requirement and in return assessing each broadcaster a fee, payable in "dollars or minutes," on all political advertising the broadcaster sells, with revenues going to the broadcast bank. Norman J. Ornstein, *Forget Sweeping Reform: Here Are 5 Realistic Changes*, ROLL CALL, Jan. 9, 1997, at 34.

The Assessment. For the reasons detailed earlier, all the free TV proposals are constitutionally vulnerable. A brief recapitulation of why that is so will serve to emphasize the point.

In Fifth Amendment terms, the proposals push the government ownership claim to the breaking point. On the most rudimentary functional economic analysis of how the licensing system actually works and is administered, the free TV mandates would constitute a taking of property. By requiring that broadcasters forgo substantial income from the sale of broadcast time during the license period, or by assessing broadcasters a "fee" derived solely from their sales of political ads and devoting it solely to funding candidate time, each of the free TV proposals not only would constitute an obviously coercive wealth transfer but also would unacceptably disrupt the broadcasters' legitimate, government-induced, investment-backed expectations.

In First Amendment terms, and looking initially at their impact on broadcasters' rights, the proposals all raise serious concerns even if the Court continues to adhere to *Red Lion*'s broadly discredited scarcity fiction. That is so because each of the post-*Red Lion* cases in which the Court gave its blessing to government-imposed content requirements is distinguishable in fundamentally important ways from the free TV mandates. If the Court were to play one or another of the variations on the ownership theme to analyze the broadcasters' First Amendment rights, the

result might be somewhat more in doubt, but only because a Court willing to take the spurious ownership claims seriously would thereby signal its willingness to ignore basic First Amendment principles. If the Court, on the other hand, were to abandon *Red Lion*, reject the ownership metaphor, and analyze the free TV mandates as though broadcasters enjoyed the same First Amendment rights as members of the print media, the mandates would almost surely succumb to the broadcasters' First Amendment challenge. Among other causes for constitutional skepticism is the fact that the governmental interests that free TV would supposedly advance are either impermissible or ill-served by the scheme.

In addition, all the proposals would, in one way or another, violate candidates' First Amendment rights. McCain-Feingold would do so by impermissibly and without adequate justification requiring candidates to sacrifice their right to spend their own resources to advocate their own election; it would also unjustifiably dictate the format of candidate speech. Both the fairness in political advertising proposal and the broadcast bank proposal would do so by dictating in even more intrusive and impermissible detail the format of candidate speech. The broadcast bank proposal, in addition, would condition candidates' receipt of vouchers on their raising certain kinds of contributions from in-state supporters. The condition has no apparent connection to the "reduce the cost of campaigning" and "make political discourse more substantive" goals that the proposal is touted as serving.

Its proponents often portray free TV as something of a panacea—a practically painless cure for practically all of our campaign-financing woes. They should be more skeptical about the idea that they have so enthusiastically embraced. In all its incarnations it is almost certainly unconstitutional. For any embodiment of it to pass constitutional muster, the Court would have to suspend quite completely

its usual disbelief with regard to regulations that govern political speech. In addition, it would have to permit itself to become the victim of a constitutional shell game. While the arguments on behalf of free TV may permit doctrinal *is* to *appear* to be dotted and the *t*s to be crossed, closer analysis shows that they misconceive the fundamental premises of both the First and the Fifth Amendments.

In policy terms, too, free TV has serious weaknesses. First, the goals it claims to pursue are impermissible objectives for a government in a free society. Second, it is unlikely that free TV would in fact come anywhere close to achieving its posited objectives. Third, "free" TV is not free; neither does it represent—as its supporters try to imply—a *public* subsidy provided by *public* funds. Instead, it represents a subsidy provided by *broadcasters*.

Those three weaknesses might be enough to condemn the idea to oblivion, but there is a fourth: no matter what scheme of free TV were to be adopted, implementing the free TV mandates would be an administrative nightmare. All the free TV proposals and all the optimistic urgings on their behalf by their supporters imply through silence about administrative details that free TV would be practically self-executing. Proponents insinuate that getting the time slots in equitable portions *from* the broadcasters, allocating them *to* the appropriate federal candidates, and then making arrangements so that the eligible candidates actually get *on the air with the required format and the suitably crafted message in the relevant market* are simple tasks, easily accomplished merely by ordering them to be done.

Proponents of free TV also imply that enforcement would be without cost or complexity, whether the task be assigned to the Federal Election Commission or to the FCC. The truth is completely otherwise, however, as a moment's reflection will reveal. Consider the range of quid pro quos that the mandates contemplate, multiply them by the number of candidates for federal office, and you will

have a sense of the sheer number of enforcement issues that might arise. Divide the number of hours of free time, again by the number of federal candidates deemed eligible to receive the benefit, and you will discern a second layer of complexity. Understand that all those enforcement tasks will be assigned to government officials and think carefully about the intensity of monitoring that ensuring compliance will require. You will understand and quite likely share the fear of its freedom-loving opponents that "free TV" will inevitably entail a very significant expansion of government intrusion into and control of core political activity.

Conclusion

The claims of free TV's supporters obscure each of the policy weaknesses. That is a somewhat surprising fact, given the concern they so often express about misleading campaign ads and the quality of campaign discourse. As the debate on free TV progresses, however—whether it takes place in legislative chambers or in courts or in the hearings of administrative bodies—the idea's proponents have an obligation to drop some of their rhetorical camouflage and forthrightly to address those very significant substantive issues.

In addition, the severity of the constitutional concerns that the free TV proposals raise should worry not just lawyers and judges, nor should only potential opponents of the proposals address them. The constitutional analysis should disconcert proponents of free TV too, because the constitutional problems do not merely represent artifacts of dry and lifeless legal doctrines. To the contrary, the problems arise because the proposals themselves are to a disturbing extent inconsistent with traditions and values that many if not most Americans revere deeply, despite whatever misgivings they may have about negative campaigning and the costs of running for political office.

Political freedom and a collective unwillingness to cast the burdens of public improvements on the few rather than the many are traits that have characterized American democracy since the founding of the Republic. The free TV proposals would put both traits at grave risk.

About the Author

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Professor BeVier graduated from Smith College in 1961 and Stanford Law School in 1965.

APPENDIX B

Public Interest Council

Free Airtime for Candidates and the First Amendment

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Among the sideshows in the debate over campaign finance reform are various proposals that would require television broadcasters to provide free air time to political candidates. These proposals, packaged in various shapes and sizes, are not just bad ideas: They violate constitutional law.

As Oliver Wendell Holmes quipped, certitude is not the test of certainty, and the skeptic is entitled to ask what exactly is meant by the cocksure assertion that governmentally mandated free air time would violate the Constitution. Is this a slam dunk? Do existing constitutional doctrines clearly make such proposals unsound? Or is this merely an advocate's assertion, a prediction that, when put to the test, courts *would* strike such programs down, and moreover, *should?*

The answer is a blend. Some of the current suggestions being floated about town would clearly run afoul of well-established First Amendment precepts. Others would be in sharp tension with the animating principles of modern First Amendment law, and would very probably be struck down by judges sensitive to those principles. Free air time may be a popular project with some very thoughtful and altruistic reformers, but it is up against the gathering momentum of numerous First Amendment doctrines and, in any judicial test, would almost certainly fail.

Proponents of free air time base their constitutional justification for their proposals primarily on two related notions. On the broadest level, proponents invoke the idea that broadcasters are "public trustees" who may be regulated by government in "the public interest." More narrowly, they argue that free air time may be imposed on broadcasters as a quid pro quo in exchange for the grant to broadcasters of additional spectrum space for digital television. These justifications may sound plausible to some at first blush, but they do not hold up when analyzed against prevailing First Amendment norms. Several discrete aspects of contemporary First Amendment law would be placed in play by free air time proposals.

I. Unconstitutional Conditions

First, the proposals trigger the century-old constitutional doctrine of

"unconstitutional conditions." There was a time when American constitutional law was captive to what was known as the "right / privilege" distinction. Americans had certain constitutional "rights," such as freedom of speech or the free exercise of religion. But Americans had no right to government largess, such as government jobs, public education, welfare benefits, franchises, or licenses. These were deemed mere "privileges." The government could attach whatever strings or conditions it wanted to the receipt of these privileges. The recipient had the choice of accepting the government benefit with its conditions attached, or declining the benefit. It was a world of "beggars can't be choosers, don't look a gift horse in the mouth, learn to accept the bitter with the sweet."

This harsh regime, however, was long ago modified by the doctrine of unconstitutional conditions. In a series of landmark Supreme Court rulings, it was held that government did not have a free hand to impose any conditions it wanted on the receipt of public benefits. Some conditions were unconstitutional. A collection of restraining principles evolved, limiting the power of government. Americans now *could* look a gift horse in the mouth. Several of these limiting principles are directly relevant to free air time proposals.

- The Supreme Court has drawn a distinction between restrictions imposed by the government that relate to the government's own speech, and restrictions imposed when the government is empowering or subsidizing private speakers. When the government itself is entering the marketplace of ideas, through the speech of its own employees or contractors, it has substantial power to control the content of the message _ since the message, by hypothesis, is supposed to be the government's own. But when the government is merely enabling private speakers to express their views in the marketplace, by providing the forum for that speech or subsidizing it in some manner, government's power to manipulate the content of the speakers' messages is drastically limited.

In its 1995 decision in *Rosenberger v. University of Virginia*,[1] for example, the Supreme Court held that the University of Virginia could not withhold funds from a student religious publication when it funded other student publications and activities. The Court rejected the simple-minded assertion that the university could do what it wanted with its own scarce resources, holding that once it entered the business of funding student publications, it could not discriminate among various viewpoints. The Court heavily emphasized the distinction between the university controlling its own speech, and the university controlling the speech of private speakers who sought to participate in its subsidy program. In a key passage the Court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private

> entities to convey its own message. In the same vein, in *Rust v. Sullivan* we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes....It does not follow, however... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

This passage from *Rosenberger* exposes the deep constitutional fissure in free air time proposals. Yes, the government may have licensed broadcasters to use the electronic spectrum. But it is not the government *itself* that is doing the broadcasting. Rather, the government has created its system of licensure to distribute frequencies efficiently and to promote a diversity of voices among private speakers, who maintain their rights under the First Amendment to choose for themselves what they will or will not say.

- A second related restraining principle is the "professionalism" notion. State university professors, for example, are government employees, and their research is often government funded. When legislative bodies attempt to dictate what professors may teach and research at too great a level of specificity, however, principles of academic freedom kick in to insulate the professor from such controls. Public libraries and public schools are funded with tax dollars. But the Supreme Court has held that there are limits to the power of government to remove books from them. A librarian applying professional norms for shaping and maintaining a collection has great freedom to make such choices. But there are First Amendment limits on the power of a political body, such as a school board, to interfere with those choices in order to advance a particular viewpoint agenda. If these limits exist when political bodies attempt to exert control down the government "chain of command," so to speak, they are all the more powerful when the government's orders are issued to outsiders such as broadcasters, who are linked to the government only by virtue of the licenses they hold.

- A third limiting principle is the "nexus" requirement. The Supreme Court requires a substantial relationship between the benefit being granted and the "string" being attached. When a zoning board grants a license for a hardware store to expand its business, for example, it is permissible to attach the condition that the lot be landscaped to handle additional parking needs, and to deal with extra water runoff caused by paving. But the Supreme Court held in 1994 that it was not permissible for the government to impose a requirement that the hardware store owner create a walking

and cycling path through a "greenway" across the property, no matter how attractive and altruistic the policy goal of creating such paths might be. This was a gratuitous condition, the Court held, not sufficiently related to the expansion permit.

So too, the government may not impose a "political greenway" on broadcasters. The government would only be justified in attaching "strings" to the grant of new spectrum space for digital broadcasting if those strings bear some substantial relation to the grant. The government is not free to simply pick out of the sky nice-sounding policy objectives like free air time and impose them on broadcasters because it has granted those broadcasters additional spectrum. Indeed, there is absolutely no logical nexus between digital broadcasting and political campaigns. There is nothing about changing the technical method of broadcasting that has anything whatsoever to do with the *content* of what is broadcast, let alone content defined specifically as "speeches by candidates."

- Fourth, the government cannot presume to attach conditions to benefits that are not in fact benefits. It is not at all clear that the grant of additional spectrum space was a "benefit" to broadcasters *at all*. The conversion to digital broadcasting, it now appears, will probably cost broadcasters more than they are likely to recoup. There's no *quid* to the *quid pro quo*.

The proponents of free air time may have high-minded objectives. But the device of attaching strings to government benefits has, throughout our country's history, almost always been a vehicle for suppressing civil liberties. The attempt to use this device as the fulcrum for forcing broadcasters to grant free air time places free air time proponents on the wrong side in the march of constitutional history.

II. The Constitutional Status of Broadcasters

Free air time proposals place in issue the constitutional status of broadcasters. There are two models at war here. Under one view broadcasters are a sort of partner with government, engaged in a joint venture encapsulated in the catch-phrase "public trustee." Government should attempt to elevate public discourse, the argument goes, and broadcasters should participate in that noble endeavor. Broadcasters are thus seen as "public discourse utilities" who may be regulated according to whatever current policy vogue is deemed in the public interest.

A competing model sees broadcasters as independent journalists, with freestanding First Amendment rights to "call 'em as they see 'em" without government interference. This model contemplates an arms-length tension between government and broadcasters, the same healthy tension that has traditionally dominated the American conception of journalists as watchdogs who occupy their own autonomous role in the system of checks and balances. This second model, of broadcasters as free agents with editorial autonomy and journalistic freedom, now dominates the

constitutional landscape.

It is at this juncture that proponents of free air time proposals ritually incant the Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*,[2] imposed specific and confined obligations on broadcasters to provide opportunities for persons to respond to personal attacks and present opposing viewpoints. *Red Lion* has been much-roasted in recent years by judges and scholars. It is doubtful that the Supreme Court would adhere to the ruling in *Red Lion* if it were presented with the issues in that case again. More importantly, Red Lion was an extremely narrow holding, made even narrower by subsequent Supreme Court rulings. Whatever lingering vitality *Red Lion* may have, it is certainly not enough to support incursions on the independence of broadcasters as sweeping as mandatory free air time for candidates. Time and technology have passed *Red Lion* by:

- The fairness doctrine itself no longer exists. It was wisely abandoned by the FCC because it was deemed unnecessary and counterproductive. The Commission, in a decision affirmed by the courts,[3] ruled that the fairness doctrine does more to harm First Amendment values than to promote them.

- Red Lion was predicated on the notion of "spectrum scarcity." There were many voices clamoring to be heard and not enough broadcast channels to carry them all. Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes _ through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression. Pundits such as Norman Ornstein, one of the major proponents of free air time, can be heard day and night commenting on the issues of the times by anyone with a remote control and the willingness to surf. For every point in modern politics there is a cacophony of counterpoints. Political candidates are not wanting for the means or the media from which to project their messages.

- The Supreme Court has cautiously backed away from Red Lion. Because the FCC has abandoned the fairness doctrine, the Court has had no necessary occasion to revisit the case. But in numerous pronouncements the Court has clearly repudiated the "partnership" model for broadcasting. In *CBS, Inc. v. Democratic National Committee*,[4] for example, the Court observed that Congress sought to retain a "traditional journalistic role" for broadcasters, and had "pointedly refrained from divesting broadcasters of their control over the selection of voices."

- There is no sense of "joint venture" when Sam Donaldson grills Bill Clinton about Monica Lewinsky. We have become so accustomed to the independence of broadcasters that we may at times forget its importance; that independence becomes as natural and as unnoticed as the air we breathe. This separation of journalism from government, however, is part

of the genius of our constitutional democracy. Like other separations in our system _ separation of church and state, separation of civilian control over the military _ the maintenance of distance between the press and government divides power and prerogative, promoting balance and accountability. We would be a vastly different society without it.

III. Neutrality and Forced Speech

Once it is understood that neither the "right / privilege" distinction nor the "public trustee" concept is sufficient to disqualify broadcasters from First Amendment protection, mandated free air time proposals run smack into a number of the most potent doctrines in modern constitutional law.

• Neutrality is the lodestar principle of modern First Amendment jurisprudence. The government is not permitted to regulate speakers according to its own views of what is "good" speech and what is "bad." Many of the proposals for free air time blithely ignore this fundamental dictum. Some, for example, presume to restrict what candidates using the free time could say, barring "political attacks" and requiring that the time be used for the presentation of positions on "issues." But the First Amendment absolutely bars government from the arrogant enterprise of deciding what speech is appropriate in political discourse. Indeed, the First Amendment does not even permit the government to presume to determine what is an "attack" and what is an "issue," as if those two notions could ever be meaningfully distinguished by the government bureaucrats who would enforce the law.

• A transcendent principle of modern First Amendment thinking, cutting across a wide variety of contexts and topics, is the prohibition on "forced speech." Government normally is not permitted to force speakers to carry the messages of others, even when the government owns or operates the medium through which the speech is being expressed. Thus the government owns main street, and a group wishing to use the street to stage a parade on St. Patrick's Day must obtain a permit to do so. But once a private group is granted the right-of-way, the government is forbidden under the First Amendment from dictating who will be allowed to march. This was the learning of the Supreme Court's 1995 decision in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*,[5] in which the Court held that Massachusetts could not force a private group of parade organizers to include gay, lesbian, and bisexual marchers, even though their exclusion was mean-spirited and discriminatory. "While the law is free to promote all sorts of conduct in place of harmful behavior," the Court admonished, "it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

IV. Campaign Reform and *Buckley v. Valeo*

Free air time proposals are currently being advanced as part of the larger

agenda of political campaign reform, an agenda that implicates the Supreme Court's historic 1976 ruling in *Buckley v. Valeo*,[6] striking down aspects of the Federal Election Campaign Act of 1971 and upholding others. *Buckley* is a First Amendment thicket, growing thicker and thicker. Many Supreme Court rulings since 1976 have elaborated on *Buckley* and it is clear enough that public funding of election campaigns is not *per se* unconstitutional. But there is a world of difference between public funding of campaigns, and the commandeering of the air time of broadcasters. It is one thing, under the First Amendment, for the government to give candidates money to buy their own time on television. It is quite another to cross the line of separation between the government and the media, and forcibly impose free time obligations on broadcasters.

In a 1990 decision that is often overlooked, *Austin v. Michigan Chamber of Commerce*,[7] the Supreme Court actually explored the question of whether the press can be swept in and made part of the regime of political campaign reform. The case involved a Michigan law restricting corporate political expenditures. The law contained an exemption, however, for media corporations. The Supreme Court not only held that the exemption was permissible, but seemed to signal that the law would *not* have been upheld *had* it been applied to the press. The Court emphasized the "unique role" the press plays in our system, stating that the "press serves and was designed to serve as a powerful antidote to any abuses of power by government officials."

V. Conclusion

The mandated free air time bandwagon should not be permitted to start a roll. Free air time sounds good to some when they first hear of it. The idea is altruistic and catchy. But it is an idea out of touch with reality and out of synch with the First Amendment. There are many practical problems with free air time, among them the simple fact that you can put candidates on television but you can't make people watch. More importantly, mandated free air time is a First Amendment nightmare. There are many thoughtful proposals for reforming American politics in a manner consistent with our First Amendment tradition. Free air time is not one of them.

Notes

[1] *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995).

[2] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[3] *See* 1985 Fairness Report, 102 F.C.C.2d 145 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[4] *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973).

[5] *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995).

[6] *Buckley v. Valeo,* 424 U.S. 1 (1976).

[7] *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

The Author

Rodney A. Smolla is the Arthur B. Hanson Professor of Law at the College of William and Mary, Marshall-Wythe School of Law. From 1988 to 1986 he was Director of the Institute of Bill of Rights Law at William and Mary. He graduated from Yale in 1975 and Duke Law School in 1978, where he was first in his class. He then served as law clerk to Judge Charles Clark on the U.S. Court of Appeals for the Fifth Circuit. After practicing law in Chicago, he entered academic life, and taught at the De Paul, University of Illinois, and University of Arkansas law schools before beginning at William and Mary. He has also been a visiting professor at the University of Denver, University of Indiana, and Duke University law schools. He writes and speaks extensively on constitutional law issues, and is also active in litigation matters involving constitutional law.

His book *Free Speech in an Open Society* (Alfred A. Knopf, 1992) won the William O. Douglas Award as the year's best monograph on freedom of expression. He was the editor of *A Year in the Life of the Supreme Court* (Duke University Press, 1995), which won an ABA Silver Gavel Award. His book *Suing the Press: Libel, the Media, and Power* (Oxford University Press, 1986) won the ABA Silver Gavel Award Certificate of Merit. He is also the author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988). He is the author of three treatises: Smolla and Nimmer on Freedom *of Speech* (West Group, two volumes, 1996); *Federal Civil Rights Acts* (West Group, two volumes, 1994); and *Law of Defamation* (West Group, 1986), and co-author of a casebook on constitutional law: *Constitutional Law: Structure and Rights in Our Federal System* (with Banks and Braveman, Matthew Bender, 1996).

Issues in Broadcasting and the Public Interest

This paper is adapted from Prof. Smolla's presentation at a panel, "Public Interest Obligations of Broadcasters and the Gore Commission," convened by The Media Institute in Washington, D.C., on Jan. 28, 1998. Papers in the *Issues in Broadcasting and the Public Interest* series are published under the auspices of The Media Institute's Public Interest Council, a study group of communications attorneys and constitutional scholars formed to follow the work of the Gore Commission.

The Media Institute is a nonprofit research foundation in Washington, D.C., specializing in communications policy and First Amendment issues. The Institute advocates and encourages freedom of speech, a competitive communications industry, and excellence in journalism.

APPENDIX C

THE UNCONSTITUTIONALITY OF FEDERALLY MANDATED "FREE AIR TIME"

A Summary Prepared for
The National Association of Broadcasters
for Presentation at a Meeting of the Presidential Advisory Committee
on Public Interest Obligations of Digital Television Broadcasters

University of Southern California

March 2, 1998

P. Cameron DeVore
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SUMMARY

"Free air time" is the current mantra of many earnest and well-meaning critics of America's campaign finance practices. Its proponents blame the cost of television advertising for the perceived problems with our campaign finance system, and they propose "free air time" as a kind of universal solvent, touted to be a cure for almost every election malaise ranging from incessant high pressure solicitation, to negative campaign advertising, to declining voter participation and growing voter cynicism.

However, strictly as a matter of First Amendment analysis it is impossible to escape the conclusion that a "free air time" mandate would be subjected to strict First Amendment scrutiny and struck down by the courts. Indeed, even if lesser scrutiny[1] were

[1] Strict scrutiny requires government to prove a compelling interest, directly advanced by the least restrictive regulatory means. See, e.g., Reno v. ACLU, 117 S.Ct. 23, 29 (1997). So-called "intermediate scrutiny" imposes the somewhat lesser burden on government to prove a substantial interest, directly and materially advanced by means no more extensive than necessary. One version of the intermediate scrutiny test is for content neutral regulations imposing only a secondary impact on speech, as set forth in United States v. O'Brien, 491 U.S. 367 (1968) (federal ban on burning draft cards upheld, as cards integral to

to be applied, the government would be equally unable to meet its heavy burden of proving not only that the goals of "free air time" are both real and substantial when weighed in the balance against First Amendment values, but also that mandated "free air time" would "directly and materially" advance those goals.[2]

Indeed, the daunting problem that must ultimately be addressed by proponents of "free air time" is that the concept relies on a naked governmental directive to America's broadcast media to air core political speech not of their choosing, but instead selected by candidates and defined by government fiat. As set forth below, merely intoning with great certitude the question-begging citation of Red Lion[3] or the practically and legally "empty"[4] assertion that broadcasters are, in effect, merely squatters on the public's spectrum, will not suffice to save "free air time" from its many constitutional infirmities

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selective service system); also see Turner Broadcasting Co. v. FCC, ("Turner II") 117 S.Ct. 1174 (1997) (upholding under O'Brien the federal "must carry" requirement imposed on cable television industry). Another version of intermediate scrutiny is exemplified by the Court's test for regulation of commercial speech as defined in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Lesser so-called Red Lion scrutiny, applied to uphold the FCC's fairness doctrine by the Supreme Court in 1969, is discussed at p. 15, below.

[2] See p. 47-49 of Professor Lillian R. BeVier's monograph, "Is Free TV for Federal Candidates Constitutional?", American Enterprise Institute, Washington DC, 1998 (attached to this summary as Exhibit A):

> If the [Supreme] Court takes at all seriously its obligation to call what appears from the present state of the evidence to be a rhetorical bluff of free TV's proponents – if it truly requires them to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," [citing Turner Broadcasting v. U.S. ("Turner I"), 512 U.S. 622 at 664 (1994)], the proponents will have to come up with well-founded answers to [Professor BeVier's challenging observations about the ephemeral effects that "free air time" would have on the plethora of ills asserted by its proponents in justification of the concept]. They will, in other words, have to offer a defense much more solid than the vague generalities and unsupported assertions about causes and effects that they have offered so far.

[3] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), discussed at p. 15, below.

[4] BeVier, supra, at 4.

under the most fundamental and well-established principles of First Amendment jurisprudence.[5]

I. FEDERALLY MANDATED "FREE AIR TIME" WOULD BE IMPERMISSIBLE UNDER THE FIRST AMENDMENT

As set forth below, nothing in Red Lion – even assuming that this 1969 decision of the Court rendered at the dawn of the modern era of exploding technological multiplication of both spectrum and of other electronic media retains any legitimacy today — should support the imposition of a "free air time" requirement or prevent the application of the First Amendment guarantee of virtually absolute editorial freedom to the broadcast media.[6] Indeed, virtually absolute editorial freedom lies at the heart of First Amendment protection, and "free air time" proposals run squarely into a First Amendment wall. Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2350 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

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[5] See Professor BeVier's thorough analysis of the "ownership-of-spectrum" argument in Exhibit A, p. 4-13. The "ownership" trope is no more persuasive, factually, than would be an argument that because newspaper newsracks are almost always on public property—and are as essential to newspaper distribution as is spectrum to the broadcasters, the newspapers thereby give up editorial control to some form of government regulation. Also see comments of Williams, J., dissenting from denial of rehearing *en banc* in Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) ("There is, perhaps, good reason for the [Supreme] Court to have hesitated to give great weight to the government's property interest in the spectrum.")

[6] See remarks at p. 3 of "Free Air Time for Candidates and the First Amendment," by Professor Rodney A. Smolla, filed with the Advisory Committee this week:

> [Red Lion] dealt with the question of whether, in the absence of government mandates, the views of some might not be reflected on broadcast stations. No one could argue that the views of candidates for political office are not widely available on broadcast stations now, both through news and other free coverage and through the sale of advertising time. Thus, free time proposals do not flow from any claimed scarcity of electronic voices and cannot rely on Red Lion for constitutional support. "Spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory." Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J. concurring), *cert. denied*, 493 U.S. 1019 (1990).

Also see further Red Lion analysis at p. 15 below.

Also, the free time requirement would force broadcasters to provide time to candidates to be used as the candidates choose, or in a manner prescribed by federal fiat. The First Amendment would impose an insuperable burden on the government to prove that such a content-based requirement did not infringe First Amendment freedoms. See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991). Such a law could be justified under the First Amendment only by a showing of a compelling interest, directly advanced by the mandate, and not capable of being advanced through alternatives that do not encroach on the editorial discretion of the broadcaster.

Historically, broadcasters have been subject to more restrictions than have other media on their constitutionally protected editorial discretion, but the late-60's rationale of spectrum scarcity no longer justifies singling out broadcasters for reduced First Amendment protection. As also discussed below, compelling broadcasters to finance political campaigns would bear no direct relationship to broadcasters' traditional public interest duties, and would upset the delicate balance between their journalistic freedoms and their obligations as licensees of the public airwaves.

A. A "Free Air Time" Mandate Impermissibly Would Require Broadcasters to Engage in Compelled Speech.

1. Government May Not Mandate Political Speech Absent Compelling Necessity and Precise Tailoring.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and

adherence." Turner Broadcasting System, Inc. v. F.C.C. ("Turner I"), 512 U.S. 622, 639 (1994) (plurality op.).

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2350 (1995) (citation omitted); accord, Pacific Gas & Electric Co. v. California P.U.C., 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

In no category of speech are these principles more important than political speech. Political speech – and particularly speech by or concerning candidates for office -- is at the core of First Amendment protection. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1518 (1995); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978); Buckley v. Valeo, 424 U.S. 1, 14 (1976). The fact that broadcasters are paid for airing political advertisements in no way diminishes this First Amendment protection or transforms either paid or voluntary political speech into speech entitled to less constitutional protection. Bellotti, 435 U.S. at 776-77; and see New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (full protection for advertisement on political subject).

Government preference for, or prohibition of, political speech or indeed any other category of speech based on its content is particularly repugnant to the First Amendment.

FCC v. League of Women Voters, 468 U.S. 364, 383 (1984); Consolidated Edison Co. of New York v. Public Service Comm'n of New York, 447 U.S. 530, 537 (1980). Content-based regulation is subject to the most stringent First Amendment scrutiny. Congress may "not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." Riley v. National Federation for the Blind, 487 U.S. 781, 800 (1988); accord, e.g., Texas v. Johnson, 491 U.S. 397, 412 (1989); Boos v. Barry, 485 U.S. 312 (1988); Pacific Gas & Electric Co. v. California P.U.C., supra, 475 U.S. at 19. Proponents of "free air time" cannot seriously contend that such a mandate would be accorded some lesser First Amendment protection because it is allegedly "content-neutral" or "viewpoint-neutral." As Professor BeVier notes in her attached monograph,

> what might matter most is that the ["free air time"] mandates are speaker-identity, subject-matter, and format-specific. True, the mandates do not single out particular viewpoints for more or less favorable treatment. Apart from the fact that they lack that inevitably fatal flaw, it is hard to imagine regulations that would be less content-neutral; looked at through the lens of what they require of candidates to become entitled to their benefits, they not only prescribe the generic class of qualified speakers (certain candidates for federal office) but also dictate the subject matter and the format of the speech.

BeVier, Exhibit A, at 38-39.[7]

"Free air time" would represent just such content-based regulation, requiring broadcasters to provide free broadcast time to candidates for federal office just prior to

[7] Also note Professor BeVier's final conclusion on the content-neutral point, Exhibit A at 40, that the "free air time" mandates would "embody such intrusive, particularistic, and overbearing governmental judgments regarding the conduct of political campaigns that the [Supreme] Court will almost certainly insist on a painstaking and skeptical evaluation of the goals they supposedly serve and their aptness as means. As most Court watchers know, scrutiny that is strict in theory is almost always fatal in fact."

elections. The candidates could use the time as they choose (subject to any format conditions imposed by the mandate), but the obvious purpose would be to allow them to discuss their candidacy, not simply to provide an opportunity to expound on general matters of public interest. All candidates in contested elections -- not simply government-favored candidates – presumably would be entitled to the subsidized time, but that time would be allotted to them because of their political viewpoints, and as a means of enabling them to convey their message in their own words. The interest in ensuring that specific individuals are given time to communicate their partisan political views would thus be directly tied to the content of what the speakers would likely say. Such content regulation of speech would be subject to strict First Amendment scrutiny. See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991) (requirement that proceeds of book by criminal about crimes be given to victims is content-based regulation of speech subject to strict scrutiny); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (tax applied to general interest magazines but exempting religious, professional, trade and sports journals is content-based regulation of speech subject to strict scrutiny); Buckley v. Valeo, 424 U.S. 1 (1976) (limits on campaign contributions and expenditures are regulation of speech subject to strict scrutiny).[8]

[8] Even if a "free air time" rule were, improbably, not considered to dictate the content of speech, it still would have to survive exacting First Amendment scrutiny. A content-neutral restriction that imposes only an incidental burden on speech can only be justified if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." U.S. v. O'Brien, 391 U.S. 367, 377 (1968); accord, e.g., Turner I, 512 U.S. at 602 (1994). To satisfy this standard, the restrictions must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). As discussed below, the government could not satisfy even this "intermediate scrutiny."

2. Requiring Broadcasters to Provide Free Time Impermissibly Would Infringe First Amendment Freedoms.

To withstand a First Amendment challenge, the government must prove that requiring broadcasters to provide free broadcast time to political candidates would directly advance a compelling governmental interest and be as precisely tailored as possible to achieve that interest. E.g., Boos v. Barry, 485 U.S. at 321-22. No doubt, the integrity and credibility of the federal electoral process is, as a matter of broad public policy, a compelling state interest. See Buckley v. Valeo, 424 U.S. at 27. Mandating free and subsidized broadcast time, however, would not directly advance, nor would it be narrowly tailored to achieve, that interest.

Free time proposals are aimed to enhance the integrity and credibility of the electoral process by reducing one part of the campaign spending budgets of political candidates. However, the government would likely find it impossible to meet its heavy burden of proving in court that a reduction in the cost of one element of campaigning would have any positive impact on the integrity of the political process. The Supreme Court already has held that "the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." Buckley v. Valeo, 424 U.S. at 57. Candidates are just as likely to be or appear to be beholden to special interests, with or without shifting some of their campaign costs to the broadcast media. Encouraging reduced spending through free broadcast time, moreover, might actually undermine public confidence in the political process by instead *increasing* the

total amount of broadcast advertising – and just as likely as not encouraging more political advertisements which are negative and uninformative, eliciting public disgust, rather than confidence, in the political system. Certainly, there could be no constitutional limit on the *content* of such necessarily "wide open and robust" advertising – whether free or paid. Thus the constitutionally required nexus between free broadcast time and government's interest in enhancing the integrity of the electoral process is either nonexistent or, at best, murky.

Even if reduced campaign spending *could* bring some measure of integrity to the political process, the proposal nevertheless would fail to survive strict scrutiny through its utter lack of tailoring to the government's asserted interest. Even a compelling governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Wooley v. Maynard, 430 U.S. 705, 716-17 (1977) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). Numerous means exist for pursuing the goal of enhancing the integrity of the political process that are far less drastic than requiring broadcasters to finance candidates' political campaigns.

Most obviously, "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." Buckley v. Valeo, 424 U.S. at 57 n.65. "This procedure would communicate the desired information to the public without burdening a

speaker with unwanted speech . . . ." Riley, 487 U.S. at 800. That Congress may have political objections to such an alternative does not render constitutionally palatable the "free air time" effort to make broadcasters shoulder the financial burden of campaign finance reform.[9]

In short, Congress cannot compel broadcasters to finance political campaigns as long as means exist to enhance the integrity of the political process that do not burden free speech rights. The "free air time" proposal would force broadcasters to make contributions of advertising, services and broadcast facilities to candidates they might not otherwise choose to support, all in violation of the First Amendment protected right not to engage in government-mandated speech. See Riley, 487 U.S. at 800; Buckley v. Valeo, 424 U.S. 1; see also Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (Brennan, J., concurring) (discussing First Amendment issues relating to forced political contributions).[10]

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[9] In addition, Congress could enact more stringent limits on contributions to political campaigns. The Supreme Court has upheld the constitutionality of limits on political contributions. Buckley v. Valeo, 424 U.S. at 58. Additional limits could include, for example, more restrictions on campaign contributions from political action committees and on so-called "soft" money contributed to political parties that is used to finance individual campaigns. Congress could also seek to work with the states to explore means of reducing the need for candidates to expend substantial funds, for example by limiting primaries and enhancing the coordination and timing of primaries and elections.

[10] Professor Smolla also suggests that Austin "actually explored the question of whether the press can be swept in and made part of the regime of political campaign reform. The case involved a Michigan law restricting corporate political expenditures. The law contained an exemption, however, for media corporations. The Supreme Court not only held that the exemption was permissible, but seemed to signal that the law would *not* have been upheld *had* it been applied to the press. The Court emphasized the 'unique role' the press plays in our system, stating that the 'press serves and was designed to serve as a powerful antidote to any abuses of power by government officials." Smolla, supra, at 6.

B. The Nature of Broadcasting Does Not Lessen the Government's Burden of Proof.

Sponsors of 'free air time" are fond of supporting their concept not only by citation to Red Lion, as discussed below, but also to the Supreme Court's decision in CBS v. FCC, 453 U.S. 367 (1981). The Court in that case concluded that the statutory right of federal political candidates to "reasonable access" to broadcast time "properly balances the First Amendment rights of federal candidates, the public, and broadcasters." Id. at 397. Presumably, sponsors of "free air time" believe that such a compulsion might well survive First Amendment challenge on the same grounds. The Court's decision in CBS, however, fails to support that proposition.

1. "Reasonable Access" Would Not Include Requiring Broadcasters to Finance Political Speech.

At least historically, the Supreme Court "has required some adjustment in First Amendment analysis" for broadcasters because "given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public" interest. FCC v. League of Women Voters, 468 U.S. 364, 377 (1984). At the same time, the Court has "made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory authority in this area." Id. at 378. Congressional restrictions on broadcasters' editorial judgment and control at a minimum "have been upheld only when [the Court was] satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." Id. at 380. Also see CBS v. Democratic National

Committee, 412 U.S. 94, 116 (1973) (Congress structured broadcast regulation to maintain the broadcasters' journalistic role).

As set forth below in discussing Red Lion, the 1969 rationale for applying the lowest standard of First Amendment scrutiny to broadcast regulation cannot survive careful analysis today. Even assuming that "free air time" need satisfy only "intermediate scrutiny," it could not withstand even that mid-level judicial review. As demonstrated above, compelling broadcasters to sponsor candidates' partisan political speech is unlikely to enhance the integrity of the electoral process, regardless of whether that interest is considered compelling or substantial. Nor is such a compelled speech requirement either narrowly or precisely tailored to further that interest in light of the availability of the numerous alternatives that impose less of a burden on protected speech. See FCC v. League of Women Voters, supra, at 397-98 (restriction not narrowly tailored in light of the "variety of regulatory means that intrude far less drastically upon the 'journalistic freedom' of . . . broadcasters") (quoting CBS v. Democratic Nat'l Committee, supra).

Indeed, the decision in CBS v. FCC is consistent with this analysis. The Court in that case did not approve a broad right of access to the media, but upheld "a limited right to 'reasonable' access" under section 312(a)(7). 453 U.S. at 396 (emphasis in original). The Court reached its decision only after recognizing that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties]'" and that government restrictions on the editorial

discretion of broadcasters "'call for a delicate balancing of competing interests.'" Id. at 394-95 (quoting CBS v. Democratic Nat'l Committee, 412 U.S. at 110, 117). The "reasonable access" requirement upheld by the Court was expressly limited to political candidates "for paid political broadcasts on behalf of their candidacies." Id. at 382 (emphasis added). "No request for access must be honored under § 312(a)(7) unless the candidate is willing to pay for the time sought." Id. at 382 n.8.

A requirement entitling political candidates to free broadcast time goes far beyond "reasonable access" and would upset the "delicate balance" the Court reached in CBS v. FCC. The Court found that a limited right of political candidates to "reasonable access" "represents an effort by Congress to assure that an important resource -- the airwaves -- will be used in the public interest," 453 U.S. at 397, and concluded that the public interest was served by affording political candidates an opportunity to "present, and the public to receive, information necessary for the effective operation of the democratic process." Id. at 396. That public interest does not, however, include forcing broadcasters to subsidize the cost of broadcasting political candidates' self-selected information. [11]

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[11] There is only a tenuous connection between the FCC's admitted power to regulate the *context* of broadcasting,. and its dubious power to issue a mandate designed to cure the perceived ills of America's campaign finance process. As Professor Smolla comments at p. 3 of his article "Free Air Time for Candidates and the First Amendment,"

> indeed there is absolutely no logical nexus between digital broadcasting and political campaigns. There is nothing about changing the technical method of broadcasting that has anything whatsoever to do with the content of what is broadcasted, let alone content defined specifically as "speeches by candidates."

Indeed, the lack of nexus between the purported goals of the "free air time" concept and the FCC's regulatory power also exacerbates the First Amendment vulnerability of any attempt by the FCC to impose such a regime.

Broadcasters add substantial value to the licenses they receive from the federal government through investments in programming, operations, and equipment. The broadcasters are compensated for this investment through the sale of broadcast time to advertisers. The rates charged for this time vary according to the time of day and the program during, before, or after which the advertisement is broadcast. A "free air time" rule would mandate not only that political candidates be given the opportunity to have their messages broadcast but presumably that the broadcasts occur when broadcast time is most valuable (so-called "prime time"). Such a requirement would be a far more expansive encroachment on broadcasters' editorial discretion than the paid "reasonable access" upheld in CBS v. FCC, and would represent nothing less than a tax on broadcasters to finance partisan political campaigns -- an issue never considered, much less decided, in that case.[12]

A "free air time" mandate would skew the "delicate balance" of competing interests entirely in favor of political candidates. Whether or not the public would gain any benefit from having broadcasters, rather than the candidates themselves, finance a substantial portion of partisan political messages, the broadcasters' ability to control the content of their broadcasts and refrain from supporting speech with which they do not

[12] Alternatively, compelled financing could be interpreted as a license fee. The tying of mandated or discounted broadcast requirements to the licensing of frequencies, however, is inconsistent with the Court's admonition that government may not, consistent with the First Amendment, condition the grant of a government benefit on the sacrifice of a constitutional freedom. Rutan v. Republican Party, 497 U.S. 62 (1990); Speiser v. Randall, 357 U.S. 513 (1958). Broadcasters do not lose their First Amendment freedoms merely because the FCC grants the licenses under which they operate. See FCC v. League of Women Voters, 468 U.S. at 376-81. Such a construction of the pending legislation also raises takings concerns, discussed infra at p. 21ff. Also see Professor BeVier's discussion of the inapplicability of Rust v. Sullivan, 500 U.S. 173 (1991), in Exhibit A, at pp. 50-51.

agree would be severely infringed. Under these circumstances, the pending legislation plainly would violate the freedom of speech and press guaranteed by the First Amendment.

2. The Lingering Death of Red Lion[13]: "Scarcity" No Longer Justifies Treating Broadcasters Differently Than Other Media Entities.

As discussed above, "free air time" would fail to satisfy either strict or intermediate First Amendment scrutiny. As for the even lower level of scrutiny applied to restrictions on broadcasters' speech by Red Lion, the legitimacy of relying on spectrum scarcity as the basis for according broadcasters less freedom than other media rapidly eroded after 1969 and has subsequently disappeared. The spectrum scarcity rationale for such disparate treatment has come under increasing judicial attack, and the apparent scarcity that formed the factual predicate of Red Lion is now "history". In all likelihood, therefore, "free air time" would be subjected to the strict judicial scrutiny applied to infringements of the editorial freedoms granted to all media by the First Amendment.

The Supreme Court in Red Lion relied on the scarcity concept to justify regulation of broadcast licensees in the public interest and the "paramount" right of the public "to have the medium function consistently with the ends and purposes of the First Amendment." 395 U.S. at 389. Such scarcity was equivalent to scarcity of outlets for diverse viewpoints because broadcast licensees were virtually the only form of electronic

[13] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

mass media for almost the first 50 years after Federal regulation was legislated by Congress. The continuing and exponential expansion of available spectrum, spectrum compression, and the advent of cable television, satellite transmission, and, most dramatically, the Internet have, however, vastly increased the number and availability of electronic mass media outlets and have erased any scarcity of sources for expression of diverse viewpoints. Indeed, confident citation of Red Lion as a First Amendment cure-all rationale for the free time mandate would be the triumph of hope over careful constitutional analysis.

There is little question that the avoidance of frequency interference and other spectrum problems is a sufficient reason for government regulation of broadcast frequencies. Licensing for those purposes is not inherently unconstitutional, nor does the First Amendment necessarily prevent content-neutral mechanisms serving goals like local and universal service. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). But "spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory." Syracuse Peace Council v. F.C.C., 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr J., concurring), cert. denied, 493 U.S. 1019 (1990).

Regulation and licensing with the goal of picking qualified licensees is fundamentally distinct from a "free air time" mandate that would force publication and subsidization of a particular kind of speech because of its content. The former allows review of a licensee's performance to measure good faith and reasonable efforts to

respond to community interest and to satisfy minimum performance criteria in the public interest. The latter would compel speech and require broadcasters to subsidize a particular kind of speech during a license term. The former comports with the requirement of minimum intrusion commensurate with the necessity of licensing. The latter founders because such political speech and can and will be heard over an extraordinary range of media and from an almost infinite variety of voices without such a mandate, and because the mandate would simply not be conceptually related to evaluation of licensees to serve the public interest.

Accordingly, courts increasingly have criticized the use of presumed scarcity of media for mass distribution of video and audio information as a means of justifying content regulation. See, e.g., Turner I, 512 U.S. 622, at 637-8 (1994) (impliedly questioning the validity of disparate treatment for broadcasters and stressing the limitations of government control of content, even under Red Lion); Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501 (D.C. Cir. 1986) ("The basic difficulty in this entire area is that the line drawn between print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. . . . Since scarcity is a universal fact, it hardly explains regulation in one context and not another."). The FCC in partial response abolished the Fairness Doctrine which gave rise to the Court's decision in Red Lion. See Syracuse Peace Council, supra (affirming Meredith, 2 F.C.C. Rec. 5043 (1987), recon. denied, 3 F.C.C. Rec. 2035 (1988), aff'd sub nom. Syracuse Peace Council, cited supra).

Thus, the traditional and undifferentiated claim that spectrum scarcity justified regulation has lost its intellectual vitality, and there has been a growing recognition that the need for government allocation and licensing to avoid interference, even under historical conditions of scarcity, cannot support governmental favoritism for particular speech or speakers based on the content of messages. *See* Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) (". . . Red Lion has been the subject of intense criticism. Partly this rests on the perception that the 'scarcity' rationale never made sense – in either its generic form (the idea that an excess demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare) and partly the criticism rests on the growing number of available broadcast channels."); Tribune Co. v. FCC, NO. 97-1228 (D.C. Cir. Jan. 16, 1998) ("It may be that . . . the FCC would be thought arbitrary and capricious if it refused to reconsider its [newspaper-broadcast cross-ownership] rule in light of persuasive evidence that the scarcity doctrine is no longer tenable."). Also, in Turner I, the Supreme Court declined to extend Red Lion to cable, stating that "whatever its validity in the cases elaborating it," the scarcity doctrine could not apply outside the broadcast context. 512 U.S. 622 at 637-8. Although the Court recognized that "courts and commentators have criticized the scarcity rationale since its inception," it saw no reason to consider those arguments in a case that involved only cable regulation. Id. at 2456-57.

Also, as set forth above, even if the scarcity doctrine under Red Lion retains some slim claim to validity – almost entirely because the Supreme Court has not specifically

overruled the decision -- the argument that Red Lion would support the imposition of "free air time" is unjustified and based on an incorrect understanding of the case, which, as set forth above, dealt solely with the question of whether, in the absence of government's "fairness" requirement, the views of some speakers might not be reflected on broadcast stations. Indeed, given the narrow holding of Red Lion, one can wonder whether those who ritually intone "Red Lion" in this context have recently read the decision. No one can argue that the views of candidates for political office are not widely available on broadcast licensees now, both through news and other free coverage and through the sale of advertising time, let alone on the multifarious and even cacophonous alternate means of electronic distribution available in this country. Thus, the free time proposal is fundamentally unrelated to any claimed scarcity of electronic voices, cannot rely on the narrow "fairness doctrine" holding of Red Lion for constitutional support, and would have to be considered, as analyzed above, under the traditional First Amendment standards applying to all media.

3. Other First Amendment Theories Do Not Support a "Free Air Time" Mandate

Proponents of "free air time" have suggested two other theories in an attempt to bolster their First Amendment arguments. Respectively, they are discussed in detail by Professor Rodney A. Smolla in his discussion of "Free Air Time," supra, and by Professor Burt Neuborne in "Blues for the Left Hand: A Critique of Cass Sunstein's *Democracy and the Problem of Free Speech*," 62 Univ. Chicago L. Rev. 423 (1995), a

copy of which is attached to this Summary as Exhibit B. Briefly, the two arguments are as follows:

(1) "*Quid pro quo*": As Professor Smolla puts it, the argument is that "free air time may be imposed on broadcasters as a *quid pro quo* exchange for the grant to broadcasters of additional spectrum space for digital television." Smolla at 1. He analyzes and refutes each of the asserted bases for the *quid pro quo* theory, including but not limited to his final conclusion that "the government cannot presume to attach conditions to benefits that are not in fact benefits. It is not at all clear that the grant of additional spectrum space was a 'benefit' to broadcasters *at all*. The conversion to digital broadcasting, it now appears, will probably cost broadcasters more than they are likely to recoup. There is no *quid* to the *quid pro quo*." Id. at 3.

(2) The *Madisonian theory of the First Amendment*. At p. 435 of Professor Neuborne's attached critique of Professor Sunstein's text, he notes:

> According to Sunstein on Madison, the First Amendment's dominant purpose is the [government's] protection of political speech that is needed for the proper functioning of a polity of political equals seeking a common good – what Sunstein calls a "deliberative democracy."

Professor Neuborne's analysis demonstrates that the so-called Madisonian theory for flipping the First Amendment to support government *regulation* of speech is deeply antithetical to fundamental First Amendment principles, and without support in decisions of the Supreme Court – except for Red Lion. The Madisonian theory is inconsistent with any "plain meaning" interpretation of the First Amendment as consistently applied by the

Supreme Court. Particularly if bereft of Red Lion as a viable citation, a likelihood discussed above, the theory doesn't make much constitutional sense and the government's purported right to dictate favored speech could not be limited to free political time, but would inevitably extend to whatever topic the government of the moment supported.

II. A "FREE AIR TIME" REQUIREMENT WOULD TAKE BROADCASTERS' PROPERTY WITHOUT JUST COMPENSATION, VIOLATING THE FIFTH AMENDMENT

The Fifth Amendment bars the government from taking private property without compensation. Proponents of "free air time" argue that requiring broadcasters to air candidate messages for free would not constitute a taking because the Communications Act bars licensees from claiming any property interest in their licenses. This simplistic analysis simply does not fairly represent the scope of broadcasters' ownership interests. While they may have no legal claim against the government for the spectrum as such, broadcasters certainly have a cognizable interest in the businesses they have developed using that spectrum, an interest that cannot be eradicated by government fiat. Further, the courts have recognized that takings occur when government requires uses of property different from the expectations of property holders or which substantially diminish their value. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Penn Central Transportation Corp. v. New York City, 438 U.S. 104 (1978).

Although a specific free time proposal has not yet been presented to the Advisory Committee, some free time proposals would grant up to two hours of free time on every

television station to each qualified candidate for public office. Even if the rule were limited to federal candidates, in some markets there would be more than 100 qualifying candidates in a given election cycle. Broadcasters could be required to give candidates up to 1020 30-second spots per week, of which half could be in evening hours. Each evening, every TV station might have to give up 73 spots. In the weeks before elections, there would be little, if any, remaining time that broadcasters could sell to commercial advertisers. Thus, even if the actual mandate were only half as onerous, broadcasters' expectations concerning the use of their stations still would be markedly changed, with potentially devastating impact on stations' incomes and market values.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This guarantee is designed to "'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Penn Central Transportation Co. v. New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 49 (1960)). Any governmental action that effects even a minor taking of property rights brings into question the constitutional obligation to pay just compensation, as measured by market value at the time of the taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Fifty Acres of Land, 469 U.S. 24, 29 (1984). Just compensation must be paid whether the intrusion is comparable to an easement, Nollan v. California Coastal Commission, 483 U.S. 825, 831-32 (1987), or more permanent, as in Loretto, and regardless of the degree of economic impact or the public interest asserted.

A "free air time" mandate would implicate at least two property rights: (1) the broadcasters' rights in station facilities and work of station personnel; and (2) the value of broadcast time that results from the investment of capital and effort to create and maintain an ongoing broadcast station where there would otherwise be only a bare frequency allocation.[14] A frequency allocation cannot be used until the licensee constructs facilities capable of sending communications using the frequency and hires personnel to operate its facilities. Even then, communication requires an audience, which the licensee develops through investment in programming, including coverage of news, public events, sports, and various entertainment programming.

Under the ostensibly "free" broadcast license scheme long ago established by Congress, the licensee recovers the cost of its facilities, personnel, and programming

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[14] It is sometimes argued that broadcasters have no property rights in their licenses because they are granted by the government only for a specified term and may be altered during their term to avoid interference problems. See generally, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). This argument, however, disregards the fact that there is a legitimate renewal expectancy, and that there must be truly compelling cause for revocation of the license during its term. As Professor BeVier points out, Exhibit A at 55:

> In Fifth Amendment terms, the [free air time proposal] push[es] the government ownership claim to the breaking point. On the most rudimentary functional economic analysis of how the licensing system actually works and is administered, the free TV mandates would constitute a taking of property. By requiring that broadcasters forego substantial income from the sale of broadcast time during the license period, whereby assessing broadcasters a "fee" derived solely from their sales of political ads and devoting it solely to funding candidate time, each of the free TV proposals not only would constitute an obviously coercive wealth transfer but would also unacceptably disrupt the broadcasters' legitimate, government-induced, investment-backed expectations.

Of course, as Professor BeVier concedes, the "jurisprudence that the [Supreme] Court has developed in considering those [takings] claims is a paradox of doctrinal unintelligibility." Id. at 14. She concludes, however, that "the Fifth Amendment, on the other hand, is designed to prevent unfair and unjust coercive wealth transfers disguised as regulation. The only way that the Court can accomplish that purpose is to hold that a regulation is a taking for which compensation must be paid. Thus, if a significant defect of the free TV mandates is that they coercively transfer wealth from broadcasters to political candidates, then Fifth Amendment principles would be at stake." Id. at 16.

through agreements to broadcast advertisers' messages at specified times during the day that the broadcaster has devoted for such purposes. The rates for this advertising depend on the length of the message, the time of day the advertiser chooses to have its message broadcast and the programming during, before, or after which the advertisement airs. By requiring that broadcasters air political candidates' advertisements -- rather than other advertisers' messages -- without charge, the pending legislation would take broadcasters' property without just compensation.[15]

CONCLUSION

A "free air time" mandate would be an attempt to advance the laudable goal of campaign finance reform, but its means of achieving that goal would raise insuperable constitutional barriers. Neither Congress nor the FCC can compel anyone, including licensed broadcasters, to finance federal candidates' partisan political speech. The proposals to extend that mandate to provide free access to broadcast time to such candidates not only would disrupt the "delicate balance" of existing law but would raise additional constitutional difficulties, further erode broadcasters' journalistic freedom, and render the "reasonable access" mandate even more susceptible to challenge. Those who take comfort from early judicial decisions sustaining regulation of broadcasters should realize that those decisions at a minimum do not support the proposed legislation and

[15] Without question, a taking would occur if Congress were simply to mandate that an expressive enterprise reserve a portion of its medium of expression for use by the general public. "Such public access would deprive [the media] of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994). "Free air time" represents just such a mandate to broadcasters. Broadcasters would be unable to exclude political candidates' messages from their programming, and they would not receive compensation for that access. These circumstances would pose a clear violation of the Fifth Amendment.

likely would no longer represent the Supreme Court's view on the permissibility of treating broadcasters differently than other media—and certainly not in the context of compelled political speech.